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THE LAW OF BILLS OF EXCHANGE

CHALMERS' DIGEST
OF THE LAW OF
BILLS OF EXCHANGE
PROMISSORY NOTES, CHEQUES
AND
NEGOTIABLE SECURITIES

ELEVENTH EDITION

BY

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PREFACE

THIS Digest remains almost as its author left it in his last edition, although I have made many verbal alterations to break up a certain monotony of expression, and here and there I have expanded or inserted a passage for the sake of students or those who come to the book on a specific point with little knowledge of the subject as a whole. I believe I have incorporated in the text or footnotes all decisions reported since the last edition as well as the only statute passed. Lord Justice MacKinnon in a recent case (*Bank Polski v. Mudder*) said that he had always regarded the Bills of Exchange Act as the best drafted Act of Parliament which had ever been passed. I venture to think this commentary of the learned draftsman is worthy of the statute; and that a commentary in the form he gave provides the best text-book on the subject since it is a continuous reminder that the law on bills and notes is first to be sought in and last to be decided by the rules as they are enacted in the sections of the Act, and not otherwise, except for the *casus omissus*. Bills of exchange are a highly artificial creation designed and moulded to meet the needs of commerce, giving us a body of law wherein the laws of logic may be pushed almost to their ultimate conclusions. Lord Wright recently said, "the law of negotiable instruments was peculiarly adapted to codification, because it was so precise and formal" (*Bank of Baroda v. Punjab National Bank*). Indeed, it is not too much exaggeration to apply to the law of bills and notes the classic phrase

from Lord Campbell on special pleading which Viscount Simon quoted so felicitously in *United Australia, Ltd. v. Barclays Bank*, “ in the exquisite logic of special pleading rightly understood, there is much to gratify an acute and vigorous understanding ”. The Bills of Exchange Act is, in truth, a work of art.

F. R. B.

WILMSLOW,
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ABBREVIATIONS

Chitty	. .	Chitty on Bills of Exchange. 11th Edition (1878).
Daniel	. .	Daniel on Negotiable Instruments. New York. 4th Edition (1891).
French Code	. .	French Code de Commerce of 1818.
German Exchange Law		German General Exchange Law of 1849.
Indian Act	. .	Indian Negotiable Instruments Act, 1881.
Nouguier	. . .	Nouguier's "Lettres de Change et Effets de Commerce". Paris. 4th Edition (1875).
Pothier	. . .	Pothier, Traité du Contrat de Change. Paris (1847).
Story	. . .	Story's Commentary on the Law of Bills of Exchange. 4th Edition (1860).

INTRODUCTION

TO THE THIRD EDITION

Soon after the publication of the Second Edition of this Digest the law relating to bills, notes, and cheques was codified by the Bills of Exchange Act, 1882. For the most part the propositions of the Act were taken word for word from the propositions of the Digest. In the Introduction to the Second Edition it was pointed out that the general propositions of the Digest could only be considered as law, in so far as they were correct and logical inductions from the decided cases which were cited as illustrations. Now the position is reversed. The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act. The illustrations, therefore, must always be tested by the language of the Act itself.

In the notes to the Act I have carefully pointed out the few provisions which were deliberately intended to alter the law. When a proposition in the Act appears to be of wide scope, I have added illustrations taken from decided cases. When a proposition appears to be of narrow scope, I have merely given a reference to the cases which were before me when drafting it. It may be said that the Act should be left to speak for itself. I am well aware that there is no necessary connection between the intention of the draftsman and the intention of the Legislature as deduced by the Courts from the terms of a statute. Still, in the present case, there will be a strong disposition on the part of the Courts to construe the Act as declaratory; and it may be useful to the profession to be referred from the abstract propositions of the Act to the concrete facts which gave rise to them. As Holmes, J., in his admirable work on the Common Law, observes (p. 27): "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must

ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."

The Bills of Exchange Act, 1882, was the first enactment codifying any branch of the Common Law which found its way into the Statute Book. It has now been followed by the Partnership Act, 1890, which was drafted by Sir Frederick Pollock.* But as a Code is still somewhat of a novelty in English law, it may be of interest to refer to the conditions under which the experiment was successfully carried out, and to consider how far it can or ought to be repeated as regards other portions of the law. Of late years several attempts at codification have been made, but from various causes they have mostly proved unsuccessful. The success of the Bills of Exchange Bill depended on the wise lines laid down by Lord Herschell. He insisted that the Bill should be introduced in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament. A Bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy. Of course codification pure and simple is an impossibility. The draftsman comes across doubtful points of law which he must decide one way or the other. Again, voluminous though our case law is, there are occasional gaps which a codifying Bill must bridge over if it aims at anything like completeness. Still, in drafting the Bills of Exchange Bill, my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effects. The idea of codifying the law of negotiable instruments was first suggested to me by Sir Fitz-James Stephen's Digest of the Law of Evidence, and Sir F. Pollock's Digest of the Law of Partnership. Bills, notes, and cheques seemed to form a well-isolated subject, and I therefore set to work to prepare a Digest of the law relating to them. I found that the law was contained in some 2,500 cases and seventeen statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1608. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield. The general principles of the law were then settled, and subsequent decisions,

* For an account of that Act, see the Introduction to Pollock on Partnership. And see also the Sale of Goods Act, 1893, and the Marine Insurance Act, 1906, which I subsequently drafted.

though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid down. On some points there was a curious dearth of authority. As regards such points I had recourse to American decisions, and to inquiry as to the usages among bankers and merchants. As the result, a good many propositions in the Digest, even on points of frequent occurrence, had to be stated with a (probably) or a (perhaps). Some two years after the publication of my Digest, I read a paper on the question of codifying the law of negotiable instruments before the Institute of Bankers. Sir John Hollams, the well-known commercial lawyer, who was present, pointed out the advantages of a Code to the mercantile community; and, mainly I think on his advice, I received instructions from the Institute of Bankers and the Associated Chambers of Commerce to prepare a Bill on the subject. The draft of the Bill was first submitted to a sub-committee of the Council of the Institute of Bankers, who carefully tested such portions of it as dealt with matters of usage uncovered by authority.* The Bill was then introduced by Sir John Lubbock, the President of the Institute. After it had been read a second time in the Commons, it was referred to a strong Select Committee of merchants, bankers, and lawyers, with Sir Farrer Herschell as chairman.† As the Scotch law of negotiable instruments differed in certain particulars from English law, the Bill was originally drafted to apply to England and Ireland only. The first work of the Select Committee was to take the evidence of Sheriff Dove-Wilson of Aberdeen, a well-known authority on Scotch Commercial Law. He pointed out the particulars in which the Bill, if applied to Scotland, would alter the law there. With three exceptions the points of difference were insignificant. The Committee thereupon resolved to apply the Bill to Scotland, and Sheriff Dove-Wilson undertook the drafting of the necessary amendments. Eventually the Scotch rules were in three cases preserved as to Scotland, while on the other points the Scotch rule was either adopted for England,

* Mr. Billingham, of the London and Westminster Bank, and Mr. Slater, of the London and County Bank, undertook the brunt of the work.

† The Committee included Sir Farrer Herschell (afterwards Lord Herschell, Q.C.); Sir John Lubbock (afterwards Lord Avebury); Mr. Asher, Q.C.; Mr. Cohen, Q.C.; Mr. Reid, Q.C. (afterwards Lord Loreburn); Mr. Whiteley, Mr. T. O. Baring, Mr. R. B. Martin, Mr. Orr-Ewing, Mr. Jackson (afterwards Lord Allerton), and Sir Charles Mills (afterwards Lord Hillington).

or the English rule applied to Scotland. A few amendments in the law were made when the Committee was unanimous in their favour, but very wisely no amendments were pressed on which there was a difference of opinion. Sir Farrer Herschell reported the Bill to the House, and it was read a third time and sent up to the Lords without alteration. In the House of Lords it was again referred to a Select Committee with Lord Bramwell for chairman.* A few amendments were there inserted, mainly at Lord Bramwell's suggestion. These were agreed to by the Commons, and the Bill passed without opposition. The Act has now been in operation for more than eight years, so that some estimate can be formed as to its results. Merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the laws of bills, notes, and cheques contained in a single Act of 100 sections. As regards particular cases which arise, it is seldom necessary to go beyond the Act itself. It must also be an advantage to foreigners who have English bill transactions to have an authoritative statement of the English law on the subject in an accessible form. If I could do the work over again, I certainly could do it better and should profit by past experience. But as it is, the Act, as yet, has given rise to very little litigation. I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much, but will be content to follow the lines laid down by Lord Herschell. Let a codifying Bill in the first instance simply reproduce the existing law, however defective. If the defects are patent and glaring it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the Bill. The form of the law at any rate is improved, and its substance can always be amended by subsequent legislation. If a Bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition.

Assuming then the possibility of further codification, the question arises whether its extension is expedient. All the continental nations have codified their laws, and none of them show any signs of repenting it. On the contrary, most of them are now engaged in remodelling and amplifying their existing codes. In India a good

* The Committee included the Lord Chancellor (Selborne), Lord Bramwell, Lord Fitzgerald, Lord Balfour of Burleigh, and Lord Wolverton.

deal of codification has been carried out, and public and professional opinion seems almost unanimous in its favour. The Bills of Exchange Act, 1882, has been adopted by New Zealand, Victoria, New South Wales, South Australia, Queensland, Tasmania, and with slight modifications by Canada.

On doubtful points frequent reference is made in this Edition to American cases * and Continental Codes and writers. In mercantile matters, when the law is uncertain or authority wanting, there is an increasing tendency to refer to foreign Codes and laws in order to see how other nations have solved the difficulty. This is especially the case as regards negotiable instruments, the most cosmopolitan of all contracts. Story, J., in his judgment in *Swift v. Tyson* (16 Peters 1), gives forcible expression to the principle. He says: "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde* (2 Burr. 887), to be in a great measure, not the law of a single country only, but of the whole commercial world. Non erit lex alia Romæ, alia Athenis, alia nunc, alia post hac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit." Lord Blackburn, in a Scotch appeal concerning a cheque, lays down a similar rule. "There are", he says, "in some cases differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the law merchant are the same in all countries. . . . We constantly in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases, when they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier or any foreign jurist, provided they bore upon the point." †

An American decision, it is needless to say, is not a binding authority in this country, but, if well reasoned, it is always considered with respect by our Courts.‡ Many of the American judgments are very valuable as expounding and testing the principles of English decisions. An English case there, like an American

* In the present edition no attempt has been made to keep the American cases up to date. They are now so numerous, and conflicting, that for the purpose of showing what American law is reference must be made to American textbooks, such as *Parsons on Bills and Notes* or *Daniel on Negotiable Instruments*, and Mr. Crawford's edition of the New York Negotiable Instruments Act of 1897.

† *McLean v. Glydesdale Bank* (1889), 9 App. Cas., at p. 105.

‡ See *per* Cockburn, C.J., in *Scaramanga v. Stamp* (1880), 5 C. P. D., at p. 808 (C. A.).

case here, is only an authority in so far as it appears to be a correct deduction from the general principles of common law and the law merchant which prevail in both countries alike.

When the subject-matter of a section of the Act is dealt with by the French "Code de Commerce", or the German "General Exchange Law, 1849", their respective provisions are compared. If they agree, a mere reference to the corresponding sections is given. If they differ, the points of difference are given in a note. A vast number of the bills circulated in England are foreign bills. It seems useful, therefore, to indicate the main points of divergence which may give rise to a conflict of laws. The French Code is of particular interest. Although enacted more than eighty years ago, no substantial alteration has been made in it by subsequent legislation. For many years it was the model of nearly all the Continental Codes. For instance, the Belgian Code de Commerce of 1872 enacted for Belgium the provisions of the French Code regarding bills and notes, with a few slight modifications borrowed from Germany, and the addition of three or four articles which embodied the result of French judicial decisions on the construction of the Code. Of late years, however, there has been a tendency to adopt the somewhat wider provisions of the German Exchange Law. Until 1888 the Italian Commercial Code was closely modelled on the French, but the new Italian Code which came into force in 1888 has departed from the French model as regards bills and notes, and has substantially adopted the provisions of the German Exchange Law. Again, the Portuguese Code of 1833 was mainly founded on the French Code. But the Code of 1888 in many respects departs from the French model, and has in the main followed the German Exchange Law, though a few provisions seem to be borrowed from the English Act. I believe the Hungarian Code of 1875, the Scandinavian laws of 1880, the Swiss law of 1881, and the Spanish Code of 1885 have also departed from the French idea and followed the German lead. French law is worthy of attention in another respect. In the absence of English authority, our Courts have, in some instances, consciously taken it as their guide. (See *per Parke, B.*, in *Foster v. Dawber*, 6 Exch. 852.) The "Code de Commerce", to a great extent, embodies and enacts the opinions of Pothier, whose authority, says Best, C.J. (in *Cow v. Troy*, 5 B. & Ald. 481),

"is as high as can be had next to the decision of a Court of Justice in this country". On doubtful points not dealt with by the Code, reference is occasionally made to Pothier, and also to the exhaustive treatise of M. Nouguiér (*Des Lettres de Change et Effets de Commerce*, 4th ed., 1875), which gives the latest results of French law.

The German General Exchange Law of 1849 (slightly modified, 1869) is important in two respects. First, it is the most elaborate and carefully worked out of the foreign Codes, and it appears to be the model to which the other Continental States (with the exception of France) are now assimilating their laws. Secondly, it is an international and not merely a national Code. All the German States have adopted it, and the terms of its adoption are these: Each State is at liberty to supplement it by additional laws of its own, but such laws are not in any way to contradict or override it. M. Nouguiér, in the work above referred to, gives in French the text of the Exchange Law, and also the various supplementary laws passed by the different States.

It would probably be very advantageous to the commercial world if this principle of an International Code could be further extended.* The difficulties of carrying it out do not seem insuperable, though doubtless they would be great. The provisions of such a Code would have to be settled by agreement, and then each State would enact it for its own territory. In the case of England it would probably be necessary to confine its operation to foreign bills, that is to say, to bills drawn or payable abroad. Our law, as regards foreign bills, does not widely diverge from the law of other commercial countries, and it diverges chiefly by allowing greater latitude than is adopted in practice. Occasional reference is also made to the Indian Code (Act XXVI of 1881, as amended by Act II of 1885), which in substance reproduces the English law as it stood in 1881. In a work like the present, it is thought it would be waste of space to carry references to foreign laws or authorities any further, but it may be worth while to mention where they can be found.

Borchardt (*Vollständige Sammlung der geltenden Wechselund Handels Gesetze aller Länder*, 1871) collects the statutory enact-

* As to further developments on these lines, see Preface to the Ninth Edition, set out at the end of this Introduction.

ments of all countries relating to Bills of Exchange. Part I gives a German translation, Part II the original text. More than forty countries have codified their law on this subject; in fact, some English colonies and the United States seem to be the only civilised nations which have not done so. Since Borchardt's work was published, however, several Continental States have re-cast their laws relating to negotiable instruments. A new Commercial Code has been enacted for the Netherlands, and an official translation of the part relating to negotiable instruments has been published in England. [See Commercial, No. 80, of 1880, C. 2609.] M. Nonguier, in a supplementary chapter to his work on Bills (*Des Lettres de Change*, 1875), compares the laws of the chief commercial nations with the French Code. The Comité de Législation Étrangère, under the direction of the French Ministry of Justice, are preparing cheap French translations of the various foreign laws relating to commercial matters. Several volumes have already been published with excellent introductions and notes. Having regard to our own insular isolation, I fear it will be long before any English Government department undertakes similar useful work. M. Massé's "*Droit Commercial et des Gens*" is a valuable work on the conflict of laws—especially as regards bills. The latest American book, I believe, is *Daniel on Negotiable Instruments*, 1876. *Story on Bills of Exchange*, and *Parsons on Notes and Bills*, are also standard American works. *Thomson on Bills of Exchange* is the standard book on Scottish law,* which, it must be remembered, differs materially from the English.

The origin and history of bills of exchange and other negotiable instruments are traced by Lord Cockburn, C.J., in his judgment in *Goodwin v. Roberts*.† He says: "Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of

* The standard Scottish textbook to-day is *Hamilton on Bills of Exchange*. Thomson's work is out of date.—[Ed., Tenth Edition.]

† *Goodwin v. Roberts* (1875), L. R. 10 Ex., at pp. 346—358. See further an interesting article by Mr. Jenks on "The Early History of Negotiable Instruments", *Law Quarterly Review*, vol. ix, p. 70. This is reprinted in *Select Essays in Anglo-American Legal Essays*, vol. iii, p. 61, with an article by W. Cranch on the history of promissory notes at p. 72. The best historical account is now to be found in *Holdsworth's A History of English Law*, VIII, pp. 118 to 192. See also *Street's Foundations of Legal Liability*, II, pp. 328 to 425.

them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled 'Specimens of a Digest of the Law of Bills of Exchange', that Richard Malynes, a London merchant, who published a work called the *Lex Mercatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 8 Rich. 2, c. 8, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, 'the introduction and use of bills of exchange in England', as indeed it was everywhere else, 'seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom'. With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure* (Cro. Jac. 6), in the first James 1.* Up to this time, the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica in 1607. Savary, cited by Mons. Nougier, in his work '*Des Lettres de Change*', had assigned to it a later date, namely, 1620. From its obvious

* 1802. Sir W. Holdsworth, *op. cit.*, p. 159, confirms Mr. Chitty.

convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our Courts. At first, the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not." The law throughout has been based on the custom of merchants respecting them: the old form of declaration on bill used always to state that it was drawn "*secundum usum et consuetudinem mercatorum*". In the time of Holt, C.J., a controversy arose between the Courts and the merchants, as to whether the customary incidents of negotiability were to be recognised in the case of promissory notes. The dispute was settled by the stat. 8 & 4 Anne, c. 9, which vindicated the custom and confirmed the negotiability of notes. Again, in 1873, the Court of Queen's Bench were of opinion that documents other than bills and notes could not be endowed by custom with the incidents of negotiability. But the efficacy of custom was again upheld by the Exchequer Chamber in 1875, in *Goodwin v. Roberts*, where it was determined that foreign scrip might be rendered negotiable by custom, so as to pass with a good title, and free from all equities to a *bona fide* purchaser. The Court there say (p. 856): "While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts."* The House of Lords approved the decision in 1876. Though the law merchant is now recognised as part of the law of the land, the process by which this principle has been evolved is still in need of elucidation. Lord Blackburn, in an interesting digression in his work on *Sale* (2nd ed.), p. 817, observes: "There is no part of the history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land. In

* Cf. Bigham, J: "... in these days usage is established much more quickly than it was in days gone by; more depends upon the number of transactions, which help to create it than on the time over which the transactions are spread, it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago" (*Weinstein v. Schuler*, [1902] 2 K. B., at p. 154).

the earlier times it was not a part of the common law as it is now, but a concurrent and co-existent law enforced by the power of the realm, but administered in its own Courts in the Staple or else in the Star Chamber." After referring to a case in 18 Edw. 4, c. 9, he proceeds: "It is obvious that at that time the law merchant was a thing distinct from the common law. This accounts for the very remarkable fact that there is no mention whatever of bills of exchange or other mercantile customs in our early books; not that they did not exist, but that they were tried in the Staple, and therefore were not mentioned in the books of common law. But as the Courts of the Staple decayed away, and the foreign merchants ceased to live subject to a peculiar law, those parts of the law merchant which differed from the common law either fell into disuse or were adopted into the common law as the custom of merchants. How this great change was brought about does not appear; but though bills of exchange were in common use among merchants in the thirteenth century, the first mention of one in an English report is in Cro. Jac. in the beginning of the seventeenth century."

The results of this formation of the law by custom are instructive. A reference to *Marius'* treatise on Bills of Exchange, written about 1670, or *Beawes'* *Lex Mercatoria*, written about 1720, will show that the law, or perhaps rather the practice, as to bills of exchange, was even then pretty well defined. Comparing the usage of that time with the law as it now stands, it will be seen that it has been modified in some important respects. Comparing English law with French, it will be seen that, for the most part, where they differ, French law is in strict accordance with the rules laid down by Beawes. The fact is, that when Beawes wrote, the law or practice of both nations on this subject was uniform. The French law, however, was embodied in a Code by the "Ordonnance de 1673", which is amplified but substantially adopted by the Code de Commerce of 1818. Its development was thus arrested, and it remains in substance what it was 200 years ago. English law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely differing from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade

debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit.* English law gives full play to the system of accommodation paper; French law endeavours to stamp it out. A comparison of some of the main points of divergence between English and French law will show how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed,† and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise: see the definition of bill in *Comyns' Digest*‡). In France the place where a bill is drawn must be so far distant from the place where it is payable that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange.§ In England, since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise.|| In France it must be payable

* This passage was written in 1878, when the first edition was published. The theory it advances is independently confirmed by the excellent Introduction to the Portuguese Commercial Code in the French edition, published by the "Comité de Législation Étrangère". See p. xxix, where it is said: "La lettre de change, qui, à son origine, n'était destinée qu'à effectuer un paiement de place en place, en évitant les dangers de la circulation du numéraire, s'est considérablement modifiée et perfectionnée. Aujourd'hui elle remplace le numéraire, et constitue entre commerçants, sinon l'unique moyen du paiement, du moins le mode de libération le plus usuel. Nous sommes loin de l'époque où elle n'était considérée que comme un simple instrument du contrat de change et où l'on exigeait que le tiré en eût préalablement reçu la contrevaluer. . . . La lettre de change est devenue dans le nouveau code un simple contra *litteris*, indépendant, valable par le seul fait des stipulations qu'il renferme et des signatures qu'il porte."

† This rule has now been abrogated by the Law of February 8, 1922.

‡ "A bill of exchange is when a man takes money in one country or city upon exchange, and draws a bill whereby he directs another person in another country or city to pay so much to A or order for value received of B, and subscribes it."

§ This rule was known as the rule of *distantia loci*. No distance was fixed by the code, and the rule, therefore, was difficult to apply. See *Nougues*, §§ 98-105. Gradually the French Courts came to consider this requirement of Art. 110 of the Code de Commerce as merely directory, and now it is expressly abrogated by the Law of June 7, 1894. Italian Code, Art. 251, negatives the rule. See, however, Netherlands Code, Arts. 100, 101; Spanish Code, Art. 249.

|| See *Stewart v. Hodges* (1692), 12 Mod. 86.

to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order becomes payable to bearer when indorsed in blank. In France an indorsement in blank merely operates as a procuration.* An indorsement, to operate as a negotiation, must be an indorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England, if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonoured at maturity; the holder, in the meantime, is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the case of an inland bill, notice of dishonour alone being sufficient. In France every dishonoured bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve.

M. D. C.

In the following passages from the Preface to his ninth edition the author rounded off his account of the codification of bills of exchange law here and abroad. This preface was dated December 31, 1926; he died on December 22, 1927, in his eighty-first year.

International Conferences were held at The Hague in 1910 and 1912 with a view to unifying the various systems of bills of exchange law prevailing in the main commercial countries of the world. Thirty-eight nations were represented. The Right Hon. F. Huth Jackson and myself were the British delegates. The result of the Conference was the preparation of a Uniform Law, or, as it was finally called, a Uniform Regulation. The scheme of the Regulation was this: A Convention was drawn up under which each nation adhering to the Convention bound itself to enact the Regulation for its own territory. Certain articles specified in the

* By the Law of February 8, 1922, full effect as a negotiation is now given to indorsements in blank.

Convention might be subject to modification to meet local requirements. Thirty-one nations adhered to the Convention. Nearly all these nations were engaged during five years in fighting each other. Since the war they have been occupied mainly in first inflating, and then in deflating and trying to stabilise, their currencies; but now perhaps some or all of them will proceed with the promised legislation. Until further information is accessible it does not seem worth while to add to the size of this book by including the Uniform Regulation. The text of it, with an English translation, is included in the Report made by the British delegates to the Foreign Office, which has been published as a Parliamentary Paper, Commercial No. 11 of 1918 [Cd. 6680].

Great Britain and the United States, for reasons fully stated by the delegates, were unable to adhere to the Convention. Throughout the English speaking world a practically uniform system, founded on the common law, has now been arrived at, and any dislocation of this system would be highly inconvenient. But cordial support was given to the Uniform Regulation which is based on the continental laws, though in many cases it adopts the English rule. As the delegates say in their report (p. 58): The result of the adoption of the Uniform Regulation will be that "the present multiplicity of laws will be swept away, and the law relating to bills and notes will be reduced to two great systems, namely, the Anglo-American system which will apply throughout Great Britain and her colonies and dependencies and the United States, and the system of the Uniform Regulation which will apply to the rest of the commercial world". No doubt as time goes the two systems will more and more approximate to each other.

In the United States the Bills of Exchange Act has given rise to an interesting experiment. Great inconvenience was found to result from the different laws enacted by different States with reference to negotiable instruments, and by the varying interpretations put on the common law by some fifty State Courts of ultimate resort. The United States Commission on Uniform State Laws, therefore, took the matter in hand and, under their supervision, Mr. Crawford, of the New York bar, drew up a draft Negotiable Instruments Law, which largely follows the English Act in its wording, though the arrangement is different. This Law has now

been enacted by more than forty States and Territories in the Union, and it is hoped that in time it will be adopted by the whole of the States, so that uniformity of law will be secured throughout the Union. In the present edition I have freely referred to the American Code, as enacted for the State of New York in 1897, especially when its language is identical with that of the English Act. The cases decided on it will be useful to us. The decision of an American Court, trained in the common law, and interpreting a statutory provision common to both countries, must always be relevant when a similar question arises in England, though it is not, of course, a binding authority.

BILLS OF EXCHANGE ACT, 1882

45 & 46 VICT. c. 61

An Act to codify the Law relating to Bills of Exchange, Cheques, and Promissory Notes. [18th August, 1882.]

PART I

PRELIMINARY

Short title.

1. This Act may be cited as the Bills of Exchange Act, 1882.

Local Extent.—The Bill as originally drafted applied only to England and Ireland. The clause excluding Scotland was struck out in committee. The Act therefore applies to the whole of the United Kingdom. S. 4 and s. 88 (4) (inland and foreign bills and notes), and the consequential enactment, s. 51 (2) (protest), apply also to the Channel Islands and the Isle of Man. The general rule of construction is that an English Act does not bind foreigners out of the jurisdiction,¹ and of course an English Act cannot bind foreign Courts. As to the effect to be given to foreign laws where they differ from English law, see s. 72.

Ireland.—The Irish Free State now has Dominion status, and can therefore deal with the Act as it pleases—cf. the Irish Free State Constitution Act, 1922. The Free State and the British Revenue authorities have come to a mutual arrangement as to bill stamps.²

Northern Ireland is still part of the United Kingdom. Its Legislature has limited powers, and the Northern Ireland Parliament is precluded from legislating for coinage, legal tender, and negotiable instruments, including banknotes, except so far as negotiable instruments may be affected by the exercise of the powers of taxation given to that Parliament.³

¹ *Jefferys v. Boosey* (1854), 4 H. L. Ca. at pp. 985, 989; *Ex p. Blain* (1879), 12 Ch. D. 522; and note *Emmicos v. Anglo-Austrian Bank*, [1904] 2 K. B. 870; affirmed 1 K. B., [1905] 677, C. A., as to the local operation of s. 24 concerning the effect of a foreign forged indorsement.

² Order in Council, March 27, 1923: see p. 357.

³ Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 87), s. 4 (12), and note s. 29 as to stamps.

See further notes to s. 4 (inland and foreign bills); s. 97 (8) (c) (Bank of Ireland).

Amendments of Law.—The Bill as originally drafted was intended to reproduce the then existing law as exactly as possible, but certain amendments of the law were introduced in committee. Provisions which alter the law are s. 4 (2), s. 7 (2) and (3), s. 8 (1) and (3), s. 12, s. 14 (1), s. 15, s. 18 (3), s. 33, s. 36 (3), s. 39 (4), s. 41 (2), s. 44 (2), s. 49 (6), s. 51 (2), s. 61, s. 62, s. 64, s. 73, s. 74, ss. 91—95, s. 100.

Construction of Act.—The Act is by its title a codifying Act, and the rule for its construction is thus stated by Lord Herschell: "I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding, such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments, words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category".⁴ Lord Halsbury said: "I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code

⁴ *Bank of England v. Vagliano*, [1891] A. C. at pp. 144-5, decided on s. 7 (3) as to fictitious payee; cf. *Bristol Tramways Co. v. Fiat Motors, Ltd.*, [1910] 2 K. B. at p. 306, C. A. (Sale of Goods Act).

another law prevailed".¹ These rules may be reduced to the succinct proposition—the sections of the code are to be considered without reference to decisions earlier than the statute except when there is any ambiguity in the wording of the statute or the construction of two or more sections.

Negotiable scrip, bonds, etc.—This Act deals only with bills, notes, and cheques. It has no application to other negotiable instruments, such as negotiable bonds or scrip, for which see p. 317.

As to bills and notes made by a corporation under seal, see s. 91 (2). The enactments which regulate English banknotes are expressly saved by s. 97 (3) (c).

Interpretation of terms.

2. In this Act, unless the context otherwise requires :—

Acceptance.

“Acceptance” means an acceptance completed by delivery or notification.

As to delivery or notification to complete an acceptance, see s. 21; and as to the requisites of a valid acceptance, see s. 17; as to acceptance for honour, see s. 65.

Action.

“Action” includes counter-claim and set-off.

See s. 80 (presumption of value), s. 57 (damages), and s. 70 (lost bill), which require this definition. For a definition of “action” for High Court purposes, see s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49).

Banker.

“Banker” includes a body of persons, whether incorporated or not, who carry on the business of banking.²

See s. 60 as to forged indorsements on demand drafts, and ss. 73 to 88 as to cheques. Compare the definition of “banker”, given by s. 29 of the Stamp Act, 1891, see p. 847. As to the relations of banker and customer, see p. 250. By s. 357 of the Companies Act, 1929, (19 & 20 Geo. 5, c. 28), a banking partnership may not consist of more

¹ [1891] A. C. at p. 120; see Lord Selborne at p. 127, and also Greer, L.J., *Carpenters Co. v. Brit. Mutual Bkg. Co.*, [1938] 1 K. B. 511, at p. 531. See author's preface. For the construction of a statutory proviso, see *Elderton v. U. K. Totalisator*, [1946] 1 Ch. at p. 65.

² As to who is or is not a banker, see *Ex p. Ode* (1861), 3 De G. F. & J. 385; *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. at p. 193; *Re Shields Estate*, [1901] 1 Ir. R. (Ch.) 172; and as to U.S., *Morse on Banking*, §§ 2-5; as to a building society carrying on an *ultra vires* banking business, see *Sinclair v. Brougham*, [1914] A. C. 898, H. L. See, further, note, p. 77.

than ten persons unless it is registered under that Act, or is formed in pursuance of some other Act or of letters patent; and cf. Schedule VII of that Act. As to Bank of England, see s. 97 (8) (c).

By s. 2 (8) of the Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), a money-lender's certificate shall not authorise him to carry on business under any name which includes the word "bank", or otherwise implies that he carries on banking business.

For a limited power to industrial societies to carry on banking business, see s. 19 and Schedule III of the Industrial and Provident Societies Act, 1898 (56 & 57 Vict. c. 39), and note s. 12 as to bills, notes, and cheques, undated or wrongly dated.

Bankrupt.

"Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

This definition includes a debtor whose estate is vested in a trustee under s. 16 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), as well as a bankrupt properly so called. It does not appear to include a debtor against whom merely a receiving order has been made. See s. 41 (d), s. 49 (10), and s. 51 (5), which require this definition. As to Scotland, see the Bankruptcy (Scotland) Act, 1918 (8 & 4 Geo. 5, c. 20), ss. 5, 97 and 187.

Bearer.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

The possessor of a bill or note payable to order is not its "bearer" until it has been indorsed, when it becomes payable to bearer (s. 8 (8)).⁷ For the rights of one who has given value for a bill payable to another's order see s. 81 (4). By s. 8 (8) a bill is payable to bearer if expressed to be so payable, or if its only or last indorsement is an indorsement in blank. See the definition of "holder" on p. 5. As to negotiation of bearer bills, see s. 81 (2), s. 84 (1), and note s. 7 (8) as to fictitious payees.

Bill and note.

"Bill" means bill of exchange, and "note" means promissory note.

For the operative definition of these terms, see ss. 8 and 88; and see "cheque" defined by s. 78.

⁷ *Of. Day v. Longhurst* (1898), 62 L. J. Ch. 834.

Delivery.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

This definition is adopted by § 2 of the New York Negotiable Instruments Law of 1897. S. 62 of the Sale of Goods Act, 1898, defines delivery as “voluntary transfer of possession from one person to another”.⁸ A wider definition is required by this Act because of instruments payable to bearer.⁹

Possession is nowhere defined in the code: the draftsman no doubt wisely refrained from the attempt. We are therefore thrown back on the dictionary. The *Oxford Dictionary* defines possession in its legal sense (under the rubric, b, Law) as follows: “The visible possibility of exercising over a thing such control as attaches to lawful ownership (but which may also exist apart from lawful ownership); the detention or enjoyment of a thing by a person himself or by another in his name; the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons”. As used in the definitions in this section, possession may be either rightful or wrongful, it would seem. This point arises again in the meanings of holder discussed below, p. 6.

A person has constructive possession when the actual possession is that of his servant or agent on his behalf; therefore delivery may be effected without change of actual possession in three cases, namely: (1) A bill is held by C on his own account; he subsequently holds it as agent for D; (2) a bill is held by C's agent, who subsequently attorns to D, and holds it as his agent; (3) a bill is held by D as agent for C; he subsequently holds it on his own account.¹⁰ As to the necessity for delivery to complete the contracts on a bill or note, see s. 21; also s. 84 as to notes. A delivery by mistake may be inoperative.¹¹

Holder.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.¹²

⁸ 56 & 57 Vict. c. 71; and see Pollock & Wright on Possession, pp. 43, 46.

⁹ The learned author is here adverting to the characteristic of negotiability, viz., that even an involuntary transfer of possession constitutes delivery of a bill or note payable to bearer, at least in favour of a holder in due course.

¹⁰ See, for example, *Field v. Carr* (1828), 2 M. & P. 46; *Bosanquet v. Forster* (1841), 9 C. & P. 659; *Belcher v. Campbell* (1845), 8 Q. B. 1. Cf. also *Ancona v. Marles* (1862), 81 L. J. Ex. 168, ratification of delivery.

¹¹ *Ex p. Cote* (1878), 9 Ch. App. at p. 32.

¹² Cf. *Akrogerri Mines v. Economic Bank*, [1904] 2 K. B. at p. 472; *Walters v. Neary* (1904), 21 T. L. R. 140, C. A. (unindorsed bill transferred for value).

"Holder for value" is defined by s. 27 (2) and (3), and "holder in due course" by s. 29.

"Holder" includes alike the payee, the indorsee, and the bearer of a bill. It signifies the mercantile owner of the instrument, who may or may not be the legal owner of it. Suppose C, the payee of a bill, indorses it in blank and transmits it to D for some special purpose—for example, discount or collection. As long as D retains possession, D, and not C, is the holder, and he alone can negotiate it.¹³ Nevertheless the original payee of a bill, and presumably a note, cannot be a holder in due course: see s. 29 and p. 98.

In the older cases the term "holder" is used in different senses. It is generally used to denote the lawful holder or holder in due course. It then includes (a) the person to whom a bill is by its terms payable, and whose title is good against all the world; (b) the person to whom a bill is by its terms payable, and who, as against third parties, is entitled to enforce payment thereof, though, as between himself and his transferor, he is a mere agent or bailee with a defeasible title—for example, an indorsee for collection.¹⁴ But "holder" is also used to denote an unlawful holder—that is, the person to whom a bill is by its terms payable—whose possession is unlawful—for example, the finder of a bill indorsed in blank—but who nevertheless can give a valid discharge to a person who pays it in good faith, and also a good title to a person who takes it before maturity in good faith and for value: see s. 88, pp. 128 and 129. The above definition includes both classes of holders.

An unlawful holder must be distinguished from a mere wrongful possessor—for example, a person holding under a forged indorsement, or a person who has stolen a bill payable to the order of another.¹⁵ Such person has no rights, and can give none: see s. 24. It is to be noted that possession is an essential part of the definition.¹⁶

Indorsement.

"Indorsement" means an indorsement completed by delivery.

See s. 21 as to delivery; and s. 32 as to the requisites of a valid indorsement. "If, then", says Alderson, B., "a transfer by indorsement, as we have before shown, consists in an indorsement—or writing

¹³ *Marston v. Allen* (1841), 8 M. & W. at p. 504; 151 E. R.

¹⁴ Cf. *Sutters v. Briggs*, [1922] 1 A. C. 1, 16, H. L. (cheque payable "A/c payee only, not negotiable", indorsed to banker for collection). A bank which has paid a cheque drawn on it is not a holder of the cheque. *Coats v. Union Bank of Scotland*, [1922] S. C. (H. L.) 114.

¹⁵ Cf. *Smith v. Union Bank* (1875), L. R. 10 Q. B. at pp. 295, 296.

¹⁶ Cf. *Emmett v. Tottenham* (1868), 8 Exch. 884; *Anson v. Marks* (1862), 31 L. J. Ex. 168.

the name of the party transferring the bill on the bill—and a delivery for the purpose of completing such transfer, it will follow that the issue *did not indorse* involves both these propositions”.¹⁷ An indorsement valid as against the acceptor may be inoperative as between indorser and indorsee, as, for example, where a bill is indorsed for the purpose of the indorsee collecting it for the indorser, or on joint account.¹⁸

The term “indorsee” is used to denote not only the person to whom a bill is specially indorsed, but also the bearer of a bill indorsed in blank—that is, any person who makes title to a bill through an indorsement.¹⁹

The term “indorser” primarily denotes the former holder of a bill who has indorsed it, but it is also used to denote any person who backs a bill with his signature, and thereby incurs the liability of an indorser: see s. 56. Under the continental codes, such person would be spoken of as the giver of an “aval”. As to “avals”, see note to s. 56. As to indorsement by way of receipt, and stamp exemption, see pp. 27 and 855.

Issue.

“Issue” means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.²⁰

See s. 9 (8), s. 12, and s. 72 (1), which require this definition. For stamp purposes a bill is not deemed to be issued till it has reached the hands of a holder for *value*.²¹ By s. 81 a bill is “negotiated” when it is transferred from one person to another in such manner as to constitute the transferee the holder of the bill. As to incomplete instruments, see s. 20.

Negotiable Instrument.—It is noteworthy that the code contains no definition of “negotiable instrument”, nor of the term “negotiable”, the meaning of which (or rather of “not negotiable”) was recently considered by Lewis, J., and the Court of Appeal in *Hibernian Bank, Ltd. v. Gysin and Hanson*.²² It is singular but true, that no reference appears in the reports of that case to the classic exposition of “negotiable” in Lord Blackburn’s judgment in *Crouch v. Crédit Foncier*, set out herein on pp. 106 and 817. See a

¹⁷ *Marston v. Allen* (1841), 8 M. & W. at p. 504; 151 E. R.; cf. *Lloyd v. Howard* (1850), 15 Q. B. 995, at p. 999; 117 E. R.

¹⁸ *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

¹⁹ *Barber v. Richards* (1851), 6 Exch. at p. 65; 155 E. R.

²⁰ Cf. *Clutton v. Attenborough*, [1897] A. C. at p. 93, H. L.

²¹ *Downes v. Richardson* (1822), 5 B. & Ald. 674; 110 E. R.; *Schofield v. Earl of Londesborough*, [1894] 2 Q. B. 680; see note to s. 64 as to alterations.

²² [1899] 1 K. B. 438; [1938] 2 A. E. R. 575, and [1939] 1 A. E. R. 166.

quotation from the judgment of Willes, J., in *Whistler v. Forster*, set out herein on p. 108. The distinction between a negotiable instrument and a transferable document of title to goods is vividly illustrated in the facts of *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*,²³ and Lord Wright's opinion therein.

Person.

“ Person ” includes a body of persons, whether incorporated or not.

See in particular ss. 3, 23, 24, and 88, which require this definition.

Value.

“ Value ” means valuable consideration.

Valuable consideration is dealt with in s. 27.

Written.

“ Written ” includes printed, and “ writing ” includes print.

This definition is inclusive. For a somewhat wider definition, see s. 20 of the Interpretation Act, 1889 (52 & 53 Vict. c. 69). As to “ signature ”, see s. 91.

Where the instrument is partly written and partly printed (as indeed is often the case), it appears that the general rule of construction would apply and that if there be any inconsistency in the two forms the written words prevail over the printed.²⁴

The definitions in this section are verbal; that is, they define the sense in which the particular terms are used in the Act. The substantial or operative definitions appear in their appropriate places in the Act itself.

These definitions, with the exception of the definition of “ bankrupt ”, are adopted by § 2 of the New York Negotiable Instruments Law of 1897, which, with or without some small modifications, is now enacted in forty-seven States or territories of the United States.

²³ [1898] 1 A. E. R. 52.

²⁴ *North and South Inss. Corp. v. Nat. Prov. Bank*, [1898] 1 K. B. 328, where Branson, J., held that the document was not a bill of exchange but merely a valid mandate for the payment of money; cf. *Glynn v. Margetson & Co.*, [1893] A. C. 361, per Lord Halsbury, at p. 367; and *Robertson and Another v. French*, 4 East 135, per Lord Ellenborough.

PART II

BILLS OF EXCHANGE

[By s. 78, except as provided in Part III, the provisions of the Act applicable to a bill payable on demand apply to a cheque, and by s. 89, with the exceptions and subject to the modifications there specified, the provisions of the Act relating to bills apply also to promissory notes.]

Form and Interpretation

Bill of exchange defined.

3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.¹

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

“Writing” and “person” are defined by s. 2.

A bill is sometimes called a draft, and an accepted bill is often referred to as “an acceptance”. The person who gives the order is called the drawer. The person thereby ordered to pay is called the drawee, and if he signifies his assent to the order in due form (s. 17) he is then called the acceptor. The person to whom the money is payable is called the payee or bearer, as the case may be. See “bearer” defined by s. 2. The foreign codes for the most part provide in terms that a bill may be drawn by one person for the account of another, and bills so drawn are recognised by s. 65 (1), and s. 68 (1). The person for whose account the bill is drawn is spoken of in England as the “third account”. For example, a merchant in America may direct his agent in England to draw on a correspondent in Paris for his (the principal’s) account.

Comparing this definition with the wider definition of “bill of exchange” in s. 82 of the Stamp Act, 1891, on p. 848, it appears that instruments may require to be stamped as bills although not possessing the mercantile incidents of bills as defined by this Act. An instrument,

¹ Cf. New York Negotiable Instruments Law, § 210, which, however, is confined to negotiable bills.

invalid as a bill under the Act, may be valid as an agreement if it conform with the requirements of the general law as to agreements,² or it may constitute a valid mandate or authority to pay.³

Form of words or language.—Under the Act, no special form of words is essential to the validity of a bill. Thus an order, sufficient in other respects, running "Credit C or order in cash", instead of "Pay", is a valid bill.⁴ German Exchange Law, Art. 4, and Italian Code, Art. 251 (among others), require the instrument to state in terms that it is a bill of exchange, and the continental codes generally do not allow a bill originally to be drawn payable to bearer, though they do not prohibit the indorsement in blank of a bill drawn payable to drawer's order.

A bill may be drawn in any language,⁵ and presumably on any material which will receive the writing, *e.g.*, parchment, silk, cotton and probably wood, slate or stone. As to the amount receivable where the sum payable is expressed in a foreign currency, see ss. 9 and 72 (5).

Ambiguous instruments.—Where an instrument is so ambiguously worded that it is doubtful whether it was intended for a bill or for a note, the holder may treat it at his option as either.⁶

Signature of drawer.—The Act requires a bill to be signed by the drawer. The signature may be added at any time—see ss. 18 and 20; but until it is so signed the instrument is inchoate and without effect. Thus A draws a bill on B, but does not sign it. B accepts, and the instrument is transferred for value to C. The instrument is neither a bill nor a note⁷; but if the instrument were in the drawer's hands

² See, for example, *Brice v. Bannister* (1878), 3 Q. B. D. 589, C. A.; *Hamilton v. Spottiswoode* (1849), 4 Exch. 200; 154 E. R.

³ *North & S. Insee. Corp. v. Nat. Prov. Bank*, [1936] 1 K. B. 328.

⁴ *Ellison v. Collingridge* (1850), 9 C. B. 570; cf. *Lovell v. Hill* (1898), 6 C. & P. 288; 172 E. R.; Story, § 83.

⁵ See, for example, *Re Marseilles Co.* (1885), 30 Ch. D. 598, where a bill in French was treated as an English instrument. In India bills drawn in the native language are called "Hundis", and native usages with respect to them are expressly saved by the Indian Act. See Chalmers and Caspersz' *Indian Negotiable Instruments Act*, 1881, 3rd ed., p. 81.

⁶ *Edie v. Bury* (1837), 6 B. & C. 433; 108 E. R.; *Lloyd v. Oliver* (1852), 18 Q. B. 471; *Fielder v. Marshall* (1861), 30 L. J. C. P. 188; cf. *Allen v. Mawson* (1814), 4 Camp. 115; 170 E. R.; *Mason v. Lusk* (1929), 45 T. L. R. 868 (*infra*, p. 19); New York Negotiable Instruments Law, § 86, and Indian Negotiable Instruments Act, s. 17.

⁷ *M'Call v. Taylor* (1865), 34 L. J. C. P. 365; cf. *Goldsmid v. Hampton* (1858), 5 C. B. (n.s.) 94; 27 L. J. C. P. 286; *Ex p. Hayward* (1871), L. R. 6 Ch. 546. But it seems doubtful how far these decisions are consistent in principle with *Mason v. Lusk*, *supra*, and *Haseldine v. Winstanley*, [1936] 2 K. B. 101. There is no actual conflict on the narrow facts so far as *Haseldine v. Winstanley* is concerned, because it was the drawer's name which was absent. In *Mason v. Lusk*, at the time of acceptance the name of neither drawer nor drawee appeared upon the bill, but subsequently the plaintiff put his name thereto as drawer.

so that he could add his signature at pleasure, it might be a security for the payment of money within s. 75 of the Larceny Act, 1861 (24 & 25 Vict. c. 96).⁸

It has been held in France that where a bill payable to drawer's order was indorsed by him, though he omitted to sign it on the face, this was sufficient: *Nouguier*, § 199.

Money and money only.—A bill must be payable in "money"—that is, in legal tender.⁹ Therefore, an order requiring payment "in good East India bonds"¹⁰ is not a bill of exchange. In a case in 1815 an order to pay "in cash or Bank of England notes" was held invalid¹¹; but now by the Currency and Bank Notes Act, 1928 (18 & 19 Geo. 5, c. 18), s. 1 (1), (2) and (8), Bank of England notes are made legal tender for any amount, even in Scotland and Northern Ireland. As to legal tender in coin, see the Coinage Act, 1870 (33 Vict. c. 10), ss. 4—6,¹² as amended by the Gold Standard Act, 1925 (15 & 16 Geo. 5, c. 29).¹³ Again, an order requiring the drawee to pay a certain sum of money and deliver up a wharf to the payee,¹⁴ or requiring him to pay a certain sum and take up a note for the drawer, is not a bill.¹⁵ So, too, an order to deliver to bearer on demand a certain quantity of iron is not a bill.¹⁶ But in the United States it seems that an instrument which gives the holder an *election* to require something to be done in lieu of payment of money may be valid as a negotiable instrument.¹⁷ As to the conversion into English money of bills expressed to be payable in a foreign currency—for example, dollars or rupees—see s. 72 (4).

Bills and notes under 20s. or £5.—By 48 Geo. 3, c. 88, negotiable bills or notes for less than 20s. were made void in England, and any person who issued or negotiated them was liable to a penalty not exceeding £20. An exception was made in favour of cheques by

⁸ *R. v. Bowesman*, [1891] 1 Q. B. 112; and it may be evidence of a debt which the drawer's executors can enforce: *Lawson's Executors v. Watson* (1907), 9 F. 1353 (Scotland). See now the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 46. Further, it would appear to be an inchoate instrument which could be completed by the drawer adding his signature (s. 20 (1) and (2)).

⁹ See "money" and "goods" compared, and the different meanings of the term "currency" discussed in *Banque Belge v. Hambrouck*, [1921] 1 K. B. 321, at p. 326, C. A.

¹⁰ *Buller N. F. p. 288*.

¹¹ *Ex p. Imeson* (1815), 2 Rosc. 225; cf. Story, § 48; New York Negotiable Instruments Law, § 20 (2) and § 25 (5), and cases cited in Crawford's edition.

¹² Bronze coins are legal tender to any amount not exceeding one shilling, silver coins to an amount not exceeding forty shillings, and gold coins to any amount.

¹³ The operation of s. 1 (2) of this Act is suspended by the Gold Standard (Amendment) Act, 1931 (21 & 22 Geo. 5, c. 46).

¹⁴ *Martin v. Chantry* (1747), 2 Stra. 1271; 98 E. R.; cf. *Re Boyss* (1886), 38 Ch. D. at p. 621.

¹⁵ *Cook v. Satterlee* (1826), 6 Cowan, New York R. 108; Story, § 48.

¹⁶ *Dixon v. Bovill* (1856), 3 Macq. H. L. 1.

¹⁷ New York Negotiable Instruments Law, § 24, and cases cited in Crawford's edition.

28 & 24 Vict. c. 111, s. 19. Both these Acts are now repealed, and consequently, except in the case of a promissory note payable to bearer on demand, there is now no limit to the sum for which an English bill, note, or cheque may be drawn. By the Bank Notes (Scotland) Act, 1845 (8 & 9 Vict. c. 88), ss. 16 and 20, negotiable bills and notes for less than 20s. are made void in Scotland, and any person who issues or negotiates them is liable to a penalty not exceeding £20, but an exception is made in favour of drafts on a banker for the payment of money "held to the use of" the drawer. This Act is not repealed; but s. 17, regulating the form of notes under £5, is repealed by the Promissory Notes Act, 1868—see p. 838.

As to promissory notes to bearer on demand, see note to s. 88. For the twelve statutes regulating bank-notes in Scotland, and the fourteen statutes regulating bank-notes in Northern Ireland, see titles "Bank Note, Scotland", and "Bank Note, Ireland", in the Official Index to the Statutes in Force, which is published annually.

Order not request.—A bill is an "order"; therefore it must in its terms be imperative and not precative, but the insertion of mere terms of courtesy will not make it precative. Thus, an instrument running, "Mr. B will much oblige Mr. A by paying to the order of C, etc.", was held good as a bill¹⁸; but an instrument running, "Please let bearer have £100 and you will much oblige me", was held not to be a bill.¹⁹

Certainty required.—It is of the essence of a bill that it should be payable at all events. Therefore its requisites must appear on its face with reasonable certainty. "The reason is—and it is equally applicable to all negotiable instruments—that it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit and negotiability, if paper securities of this kind were issued out into the world encumbered with conditions, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would be reduced to a certainty. And hence the general rule is that a bill of exchange always implies a personal general credit not limited or applicable to particular circumstances and events which cannot be known to the holder in the general course of its negotiation."²⁰ Of the certainty required as to the drawee, see s. 6; as to the payee, s. 7; as to the sum payable, s. 9.

Conditional Instruments.—A bill drawn payable in the common

¹⁸ *Ruff v. Webb* (1794), 1 Esp. 129; 170 E. R.; cf. *R. v. Ellor* (1784), 1 Leach C. C. 328; 168 E. R. The common form of a French bill runs "*il vous plaira payer*".

¹⁹ *Little v. Slackford* (1828), 1 M. & M. 171; cf. *Hamilton v. Spottiswoode* (1849), 4 Exch. 200; 164 E. R., where the document ran, "We authorise you to pay".

²⁰ *Story*, § 48; cf. *Carlos v. Fancourt* (1794), 5 T. R. at pp. 485, 487; 101 E. R.

form, "as per advice", is not conditional²¹; but a bill payable so many days after the arrival of a certain ship is conditional, and invalid, for the ship may never arrive²²; and the expression of an executory consideration on the face of a note may perhaps make it conditional.²³ A demand draft on a bank payable on condition that a receipt form on the draft be duly signed is conditional.²⁴ As to instruments payable on a contingency, see further s. 11 (2), and ss. 78 and 88. There is this distinction between a bill and a note. A bill may not be drawn conditionally, and a note may not be made conditionally; but a bill may be accepted conditionally: see s. 19. Either a bill or note, unconditional in its origin, may be indorsed conditionally: see s. 88. Again, a bill or note unconditional in form may, as between immediate parties, be delivered conditionally: see s. 21 (2).

Particular fund.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.²⁵

ILLUSTRATIONS

The following are invalid, namely, as bills or notes to pay (say) £100:—

1. out of the money in your hands belonging to the X Company²⁶;
2. out of the money due from X as soon as you receive it²⁷;
3. out of the money arising from my reversion when sold²⁸;

²¹ Story, § 65. See effect of "advice" there considered.

²² *Palmer v. Pratt* (1824), 2 Bing. 185; 180 E. R. As to a note payable "as per agreement", see *Jury v. Barker* (1858), E. B. & E. 459; 120 E. R.

²³ *Drury v. Macaulay* (1846), 16 M. & W. 146; 153 E. R. (promissory note). If, at least, the payment is conditioned on the performance of the consideration; in this case, the staying of all further proceedings.

²⁴ *Basins v. London and S. W. Bank*, [1900] 1 Q. B. 270, C. A.; distinguished *Nathan v. Ogdens, Ltd.* (1905), 98 L. T. 563, and 94 L. T. 126, C. A., where the signing of the receipt was not made an express condition. It was not a qualification of the direction to the drawee to pay, but a mere direction to the payee as to the method of indorsing the cheque. See the question further discussed, *London and Montrose Shipbuilding Co. v. Barclays Bank* (1926), 81 Com. Cas. 67, at p. 78; reversed on facts, not law, p. 182.

²⁵ Cf. New York Negotiable Instruments Law, § 22, and cases cited in Crawford's edition.

²⁶ *Jenney v. Herle* (1728), 2 Ld. Raym. 1361; 92 E. R.

²⁷ *Dawkes v. Lord Deloraine* (1771), 3 Wils. 287; 2 W. B. 782; 95 E. R.

²⁸ *Carlos v. Fancourt* (1794), 5 T. R. 482; 101 E. R., Ex. Ch.; *Hill v. Halford* (1801), 2 B. & P. 413; 126 E. R., Ex. Ch.

4. out of the moneys now due, or hereafter to become due, to me under the will of my late father, and before making any payment to me thereout.²⁹

Although the above instruments are not bills or notes they may be a valid equitable assignment or effective mandate for payment which when carried out by the addressee give him rights or an effective discharge against the author of the instrument."³⁰

The following are valid, namely, orders or promises to pay (say) £100.—

5. as my quarterly half-pay due February 1 by advance³¹;

6. being a portion of a value as under, deposited in security for the payment hereof³²;

7. on account of moneys advanced by me for the X Company³³;

8. against credit No. 20, and place it to account, as advised per X & Co.³⁴;

9. which you will please charge to my account, and credit according to a registered letter I have addressed to you³⁵;

10. bill drawn against shipment of cotton running "and charge the same to account of 100 R. S. M. L. bales cotton"³⁶

See the English and American authorities up to 1874 reviewed in *Munger v. Shannon*.³⁷

Date, place, and value.

(4) A bill is not invalid by reason—

(a) That it is not dated;

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable.

Date.—Though an undated bill may be valid, it is irregular to issue it undated. As to filling in the date in the case of an undated bill or acceptance, see ss. 12 and 20. The alteration of the date is a material alteration: s. 64 (2). Under the continental codes it is essential that a bill should be dated. As to the effect of this conflict of laws, see s. 72 (1).

Old and new style.—It is believed that all countries, even those in which the Greek Church prevails, use the new style, or Gregorian calendar: see p. 86. As to bills payable after date, drawn in a country where the old style prevails, see note to s. 72 (5).

²⁹ *Fisher v. Calvert* (1879), 27 W. R. 801.

³⁰ *Buck v. Robson* (1878), 3 Q. B. D. 686; *Fisher v. Calvert* (1879), 27 W. R. 801; see, too, *Glyn v. Hood* (1860), 1 De G. F. & J. at p. 348; 45 E. R., as to this distinction, and *passim*, *Percival v. Dunn* (1885), 29 Ch. D. 128. Cf. *North and S. Insos. Corp. v. Nat. Prov. Bank*, [1886] 1 K. B. 828.

³¹ *Macleod v. Snee* (1798), 2 Stra. 762; 98 E. B.

³² *Hausoullier v. Hartmann* (1798), 7 T. R. 783; 101 E. R.

³³ *Griffin v. Weatherby* (1868), L. R. 8 Q. B. 758.

³⁴ Cf. *Banner v. Johnston* (1871), L. R. 5 H. L. 157.

³⁵ *Re Boyce* (1886), 33 Ch. D. 612.

³⁶ *Guaranty Trust Co. of New York v. Hannay* (1918), 28 Com. Cas. 399, C. A.; [1918] 2 K. B. 628, C. A. (forged bill of lading).

³⁷ (1874), 61 New York R. 251; and see the later cases in New York reviewed by Pickford, L.J., in *Guaranty Trust Co. of New York v. Hannay* (1918), 28 Com. Cas. 399, C. A.; [1918] 2 K. B. 642, C. A.

Statement of value.—In England it is usual to insert in the bill either a statement of the value, or the words "value received"; but this has long been held not to be essential,³⁸ for the law raises a *prima facie* presumption of consideration. In the case of an accepted bill payable to drawer's order, the words "value received" mean value received by the acceptor³⁹; while in a bill payable to a third party, they mean *prima facie* value received by the drawer.⁴⁰ Whether a bill expresses that value has been given or not, extrinsic evidence is admissible between immediate parties and those in privity with them to impeach the consideration, and show its absence, failure, or illegality.⁴¹ The contracts arising on a bill are contracts in writing. Subject, then, to the provisions of s. 21 (2), parol evidence is not admissible to show that a bill was given in pursuance of an agreement inconsistent with its terms.⁴² Thus a note expressed to be given "for commission for business transacted" is, in an action by payee against maker, evidence that the payee never earned his commission.⁴³ Parol evidence would not be admissible to vary the time of payment, or otherwise to contradict the terms of the instrument as interpreted by the law merchant: see p. 56.

Under some of the foreign codes it is essential that the nature of the consideration should in general terms be stated in the bill.⁴⁴ As to the effect of this conflict of laws, see s. 72 (1).

Place of making.—It is usual and convenient to state in a bill the place where it is drawn. It is doubtful whether an alteration of the place of payment is a material alteration within the meaning of s. 64, unless the alteration changes the bill or note from an inland bill or note into a foreign one.⁴⁵ By the Bank Notes (No. 2) Act, 1828 (9 Geo. 4, c. 65), a penalty is imposed on the issue or negotiation in England of bills (other than cheques) or notes payable to bearer on demand for less than £5, which are made or purport to be made "in Scotland or Ireland or elsewhere out of England".

Place of payment.—It seems that a bill may state an alternative place of payment.⁴⁶ Where a bill is made payable elsewhere than

³⁸ *Halsh v. Traves* (1840), 11 A. & E. 702; 118 E. R.

³⁹ *Higmore v. Primrose* (1816), 5 M. & S. 85; 105 E. R.

⁴⁰ *Grant v. Da Costa* (1815), 3 M. & S. 851; 105 E. R.

⁴¹ *Abbott v. Hendricks* (1840), 1 M. & Gr. 791; 188 E. R.; cf. *Thompson v. Clubley* (1886), 1 M. & W. 212; 150 E. R.; *Abrey v. Cruw* (1869), L. R. 5 C. P. 87.

⁴² *Ridout v. Bristow* (1880), 1 Cr. & J. 281; *Poster v. Jolly* (1885), 1 C. M. & R. 703; *Young v. Austen* (1869), L. R. 4 C. P. 553; *Hill v. Wilson* (1878), 42 L. J. Ch. 817; L. R. 8 Ch. App. 888.

⁴³ *Abbott v. Hendricks* (1840), 1 M. & Gr. 791; see at p. 796; 188 E. R.

⁴⁴ French Code de Commerce, Art. 110; but see now the law of February 8, 1922, abrogating this rule; Netherlands Code, Art. 100; as to false statement of value and its effects (*supposition de valeur*), see Nouguiet, §§ 282, 283.

⁴⁵ *Koch v. Dioka*, [1933] 1 K. B. 307.

⁴⁶ *Beeching v. Gower* (1818), Holt N. P. C. 818; 171 E. R.; cf. *Pollard v. Herries* (1809), 3 B. & P. 335; 127 E. R.; note payable in London or Paris at holder's

at the residence or place of business of the drawee, the bill is said to be "domiciled" where payable. As to presentment for payment when no place of payment is specified, and the address of the drawee is not given, see s. 45 (4). By French Code, Art. 110, Italian Code, Art. 251, and German Exchange Law, Art. 4, the place of payment must be stated.

Inland and foreign bills.

4. (1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

ILLUSTRATIONS

1. A bill is drawn in Liverpool on a merchant in London. It is accepted payable in London, but is indorsed in Paris. This is an inland bill.⁴⁷

2. A bill is drawn in Liverpool on B, who resides in London. B accepts it payable in Paris. This is an inland bill.

3. A bill is drawn in London upon a merchant in Brussels, payable in London, and is accepted. This is an inland bill.⁴⁸

The distinction between an inland and a foreign bill is this: A foreign bill, if dishonoured, must be protested, whilst an inland bill need not be: see s. 51. But if any party to a bill is resident abroad, it should, as a matter of prudence, be protested for the purpose of recourse against him in his own country. By s. 45 (4), where no place of payment is specified in a bill, it is payable at the address of the drawee. On the measure of damages when a bill is dishonoured abroad, see s. 57 (2); as to conflict of laws, see s. 72.

option. For an example of a Mexican Treasury note payable at holder's option in London or New York, see *Speyer Bros. v. Inland Revenue*, [1907] 1 K. B. 246, 247, C. A.

⁴⁷ See s. 72 (3); and cf. *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77.

⁴⁸ Cf. *Amner v. Clark* (1886), 2 C. M. & R. 468; 149 E. R.; and s. 72 (3). If the bill were not drawn payable in London, it would in its origin be a foreign bill, and would, presumably, continue so, though subsequently accepted payable in London.

Sub-s. (1) reproduces the effect of the repealed 19 & 20 Vict. c. 97, s. 7, with the addition of the words "or on the face of it purports to be". Sub-s. (2) is new. The result appears to be that, though a bill purports to be a foreign bill, the holder may nevertheless show that it is in fact an inland bill for the purpose of excusing protest; while if it purports to be an inland bill, though really a foreign bill, he may treat it, at his option, as either. A bill drawn in or on the Irish Free State, it seems, is now a foreign bill, and must be dealt with accordingly. That State no longer forms part of the United Kingdom.

Stamps.—This section does not affect the provisions of the Stamp Act, 1891, which are saved by s. 97 (8). For stamp purposes any bill drawn or made out of the United Kingdom—for example, a bill drawn in the Isle of Man—is a foreign bill: see pp. 851, 852. As to a foreign note, see s. 89 (4). As to the stamp arrangement between the Irish Free State and the British Revenue authorities, see p. 857. As to Northern Ireland, see s. 29 of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), and notes on p. 842.

Effect where different parties to bill are the same person.

5. (1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.⁴⁹

ILLUSTRATION

A bill in the form "pay to — order" is signed by the drawer and indorsed by him. This is a bill payable to drawer's order, as if it ran "pay to my order".⁵⁰

A bill is sometimes drawn in the form "Pay to your own order", when the drawee acts in two different capacities—for example, if he be in business on his own account, and also agent for some other person interested in the bill.⁵¹ In such case, it is clear that the instrument is not a bill which can be enforced until the drawee has indorsed it away.⁵² So, too, when a customer wishes to get cash from his bankers over the counter, he sometimes draws a cheque in the form "Pay yourselves".

Drawer and drawee same person or firm.

(2) Where in a bill drawer and drawee are the same

⁴⁹ New York Negotiable Instruments Law, § 27.

⁵⁰ *Chamberlain v. Young*, [1898] 2 Q. B. 206, C. A. *Sed qu., per Lord Hsher and Bowen, L.J.*, if the instrument had run "Pay to — or order". Cf. *North and S. Insurance Corp v. National Prov. Bank*, [1936] 1 K. B. 328.

⁵¹ See *Holdsworth v. Hunter* (1830), 10 B. & C. 449; 109 E. R.; *Witte v. Williams* (1876), 29 Amer. R. 294; *Pardessus*, § 339.

⁵² Cf. *R. v. Bartlett* (1841), 2 M. & R. 802, 174 E. R.

person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.¹

ILLUSTRATIONS

1 A firm carries on business in London and Liverpool. The London house draw a bill on the Liverpool house. The holder may treat it as a note made by the London house payable in Liverpool, and if it be not paid the omission to give notice of dishonour to the London house is immaterial.²

2 A draws a bill on B and negotiates it away. B is a fictitious person. The holder may treat the bill as a note made by A. He need not prove presentment or give notice of dishonour.³

3 The directors of a joint stock company draw a bill in the name of the company, addressed 'To the Cashier.' The holder may treat it as a note by the company.⁴

By s. 2, "person" includes a body of persons, whether incorporated or not. For purposes of proof in bankruptcy, where drawer and drawee are the same person or firm, the instrument can only be treated as a note; that is to say, there cannot, in such a case, be two proofs against the same estate.⁵ For fictitious payee, see s. 7 (3). As to persons "not having capacity to contract", see s. 22. As to fictitious drawer, see s. 55 (2). By s. 41 (2), presentment for acceptance is excused where the drawee is a fictitious person or a person not having capacity to contract by bill. By s. 46 (2), presentment for payment is excused where the drawee is a fictitious person. By s. 50 (2), notice of dishonour is dispensed with as regards the drawer where drawer and drawee are the same person, or where the drawee is a fictitious person or has no capacity to contract; and as regards an indorser where the drawee is a fictitious person or has no capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill. If both drawer and drawee are fictitious persons the bill might, perhaps, be treated as a note made by the first indorser.

Address to drawee.

6. (1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.⁶

¹ New York Negotiable Instruments Law, § 214

² *Miller v Thompson* (1841), 8 M. & G. 576; 183 E. R.; *Fairchild v. Ogdensburg Ry.* (1857), 15 N. Y. 387; *Capital and Counties Bank v Gordon*, [1909] A. C. 240, at p. 250, H. L.; cf. German Exchange Law, Art. 6; *Willans v Ayers* (1877), 3 App. Cas. 188, P. C.; *Re Commercial Bank of South Australia* (1887), 38 Ch. D. at p. 925

³ *Smith v Bellamy* (1817), 2 Stark 223

⁴ *Allen v. Sea, Fire and Life Assurance Co.* (1850), 9 C. B. 574; 187 E. R.

⁵ *Banca de Portugal v. Waddell* (1880), 5 App. Cas. 161, H. L.; see s. 97 (1), saving bankruptcy laws

⁶ Cf. *Peto v. Reynolds* (1854), 9 Exch. 410; 156 E. R.; and 11 Exch. 418; 156 E. R., Ex. Ch.; New York Negotiable Instruments Law, § 20 (5)

ILLUSTRATIONS

1 Instrument in the form of a bill, but addressed to no one B writes an acceptance thereon This is not a bill, and B is not liable as an acceptor⁶¹, but he may be liable as the maker of a note⁶²

2 Instrument in the form of a bill payable to drawer's order, not containing the name of a drawee, but expressed to be payable 'at No 1, Union Street London' B, who lives there, accepts it This is a bill (since the drawer was indicated in the bill with reasonable certainty), and B is liable as acceptor⁶¹

3 Instrument in the form of a bill Where the address to the drawee should be the words 'at Messrs B & Co' This is a bill addressed to B & Co⁶²

For fictitious drawee, see s. 5 (2). The question raised in Illustration 2 has arisen also in Scotland and in France, and has been decided in the same way.⁶³ Speaking of the indication of the drawee, Story, J., says: "This seems indispensable to the rights, duties, and obligations of all the parties, for the payee cannot otherwise know upon whom he is to call to accept and pay the bill; nor can any other person know whether it is addressed to him or not, and whether he would be justified in accepting and paying the bill on account of the drawer".⁶⁴ As to filling up material blanks, see s. 20.

Several drawees.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange.⁶⁵

By s. 19 (2), the acceptance of some one or more of several drawees, but not of all, is a qualified acceptance. Though a bill may not be addressed to two drawees in succession, or in the alternative, it may name a drawee in case of need (s. 15); but his status is wholly different from that of an ordinary drawee. Alternative or successive drawees would give rise to difficulty as to the recourse if the bill were dis-

⁶¹ *Peto v. Reynolds*, *supra*, cf. *Edis v. Bury* (1827), 6 B. & C 493, 108 E. R. In *Mason v. Lack* (1929), 45 T. L. R. 363, Illustration 1 was criticised on the ground that *Peto v. Reynolds* is not strictly an authority for it. Nevertheless, Humphreys, J., accepted the illustration as good law and applied its principle when he held that since the alleged bill had neither a drawer nor drawee named in its order to pay, the acceptance by Lack constituted a liability as the maker of a note and not as the acceptor of a bill. See p. 41.

⁶² *Faulder v. Marshall* (1861), 30 L. J. C. P. 158, *Mason v. Lack* (*supra*), *Haseldine v. Winstanley*, [1936] 2 K. B. 101, where the name of the defendant who accepted was then put on the bill as drawee in place of the drawer's name which had been inserted by mistake. Horridge, J. (without any logical justification, it is submitted), impaled the defendant on the horns of a dilemma, *viz.*, that the defendant was liable either as acceptor of a bill or as maker of a note.

⁶³ *Gray v. Milner* (1819), 8 Taunt. 799; 129 E. R.

⁶⁴ *Shuttleworth v. Stephens* (1808), 1 Camp. 407; 170 E. R.

⁶⁵ Thomson (2nd ed.), p. 46; Nougier, § 181.

⁶⁶ Story on Bills, § 68.

⁶⁷ Cf. *Jackson v. Hudson* (1810), 2 Camp. at p. 448; 170 E. R. "There cannot be a series of acceptors". New York Negotiable Instruments Law, § 212.

honoured. This difficulty does not arise in the case of a note; consequently the makers of a note may be liable jointly, or jointly and severally, according to its tenour (s. 85), while the acceptors of a bill can only be liable jointly. A note payable in the alternative by one of two makers is invalid.⁶⁶ Under the continental codes there may be an "aval" on a bill for the acceptor: see note to s. 56.

Certainty required as to payee.

7. (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.⁶⁷

Cheques are commonly drawn payable to bearer, bills but rarely so.

"A bill of exchange", says Story, J., "ought to specify to whom the same is payable, for in no other way can the drawee, if he accepts it, know to whom he may properly pay it, so as to discharge himself from all further liability": Story, § 54. "Therefore, the document is futile, because the company says 'Pay to our order', and it has not given any order as to the person to whom payment should be made."⁶⁸ Where there is a difficulty in establishing the identity of the payee or indorsee because of some ambiguity in the name used to describe the payee or indorsee the criterion is the intention of the drawer or indorser. "But it is the intention of the indorser that matters, and the indorser intended it to go to the company which would actually cash the cheque" (Goddard, J.).⁶⁹

The continental codes prohibit bills drawn payable to bearer, but admit the indorsement in blank of bills payable to drawer's order.

Evidence of identification.—Extrinsic evidence is admissible to identify the payee when misnamed, or when designated by description only, but not to explain away an uncertainty patent on the bill.⁷⁰ Thus, if a bill is payable "to the order of the Treasurer of Portugal", evidence is admissible to show that C was the treasurer when the bill was issued⁷¹; and if a bill is payable "to the order of J. Smythe", evidence is admissible to show that T. Smith is the person intended to be described thereby.⁷² But if a bill be drawn in the form,

⁶⁶ *Ferris v. Bond* (1821), 4 B. & Ald. 679; 106 E. R.

⁶⁷ Cf. New York Negotiable Instruments Law, § 27 (6).

⁶⁸ *Per Branson, J., Britannia Lamp Works v. Mandler & Co.*, [1889] 2 A. E. R. 469, at p. 473.

⁶⁹ *Bird & Co. v. Thos. Cook & Son*, where the cheque was indorsed to Thos. Cook & Son, Ltd., when it was in fact paid to Thomas Cook & Son, Ltd.

⁷⁰ *Soares v. Glyn* (1845), 8 Q. B. 24, Ex. Ch.; 115 E. R.

⁷¹ *Ibid.*; cf. *Holmes v. Jacques* (1866), L. R. 1 Q. B. 376.

⁷² *Willis v. Barrett* (1816), 2 Stark. 29; 171 E. R.; *Jacobs v. Benson* (1855), 39 Maine B. 182.

"Pay — or order", evidence is not admissible to show that C was intended to be the payee.⁷⁴ A bill payable "to — order", and indorsed by the drawer, is payable to drawer's order⁷⁵: see s. 5 (1). But where a document in the form of a cheque was drawn "pay cash or order", it was held not to be a cheque since cash cannot be described as a "specified person", and no payee was therefore named or otherwise indicated; the words "or order" had no meaning in their immediate context.⁷⁶ As to filling up the blank by inserting a payee's name, see s. 20. In a Scots case, an instrument running, "Received from C the sum of £80 payable on demand", and signed, was held to be a note payable to C⁷⁶; and in a New York case a note payable "to the order of the indorser" was held good as being payable to any holder who might indorse it.⁷⁷ By s. 82 (4), where the payee is wrongly designated or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

Alternative payee or office holder.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.⁷⁸

This sub-s. materially alters the previous law. Before its enactment a bill drawn payable to the "treasurer for the time being" of a society was void for uncertainty⁷⁹; so, too, was a bill drawn payable "to the order of T. Smith or S. Jones", unless there was apparent community of interest.⁸⁰

⁷⁴ *R. v. Randall* (1811), R. & R. 195. But Exchequer bills in this form are deemed to be payable to bearer: *Woolsey v. Pole* (1820), 4 B. & Ald. 1; 106 E. R. Treasury bills and Council of India bills, too, are sometimes issued in this form. See form of Treasury bill, p. 334.

⁷⁵ *Chamberlain v. Young*, [1898] 2 Q. B. 206, C. A.; and cf. *Dann v. Sherwood* (1896), 11 T. L. R. 211.

⁷⁶ *North and S. Insee Corp. v. Nat. Prov. Bank*, [1936] 1 K. B. 328, applying *Grant v. Vaughan* (1764), 18 Burrow 1516, where a bill payable to Ship Fortune was said by Lord Mansfield and Wilmut, J., to be payable to no person, but since the words "or bearer" were added it was held to be a bearer order.

⁷⁷ *Thorburn on Bills*, p. 85; *M'Cubbin v. Stephen* (1856), 18 D. 1824, as cited in *Thorburn*.

⁷⁸ *United States v. White* (1841), 2 Hill R. 59.

⁷⁹ New York Negotiable Instruments Law, § 27, and cases cited in Crawford's edition.

⁸⁰ *Cowie v. Sterling* (1856), 6 E. & B. 333; 119 E. R., Ex. Ch.; *Yates v. Nash* (1860), 29 L. J. C. P. 306.

⁸¹ *Blanckenhagen v. Blundell* (1819), 2 B. & Ald. 417; 106 E. R.; cf. *Holmes v. Jacques* (1866), L. R. 1 Q. B. 876, and *Watson v. Evans* (1863), 32 L. J. Ex. 137, where the instruments were upheld.

Fictitious payee.

(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

ILLUSTRATIONS

1. A draws a bill payable to C's order. C is a fictitious person. The drawee accepts in ignorance of this fact. A then indorses the bill in blank in C's name, and discounts it with D, who knows the circumstances. D, before the Act, could not recover from the acceptor⁸¹, but since the Act it seems he could.

2. A bill purporting to be drawn by A and to have been indorsed in blank by C, the payee, is accepted *supra* protest for the honour of the drawer. It turns out that A's signature was forged, and that C was a fictitious person. The acceptor for honour is estopped from setting up these facts if the bill is in the hands of a holder in due course and it must be treated as payable to bearer.⁸²

3. By arrangement between the indorsee and acceptor a bill is drawn and indorsed in the name of a deceased person. The indorsee can recover from the acceptor.⁸³

4. A bill purporting to be drawn by A to the order of C & Co., and to be indorsed by them, is accepted by the drawee payable at his bankers'. The bankers pay it at maturity. A is a correspondent of the acceptor's, who often draws bills in favour of C & Co. It turns out afterwards that the names and signatures of the drawer and payees were forged by a clerk of the acceptor's, who obtained the money. In these circumstances C & Co. are fictitious payees, and the bankers can debit the acceptor's account with the sum so paid.⁸⁴

5. A clerk in the account branch, by false pretences, induces the plaintiff, his employer, to draw cheques in favour of B, a fictitious person, who he alleges has done work for the firm. He then forges an indorsement in B's name, and negotiates the cheques to the defendant for value. The bankers pay the defendant. The plaintiff cannot recover the money so paid from the defendant.⁸⁵

6. A clerk to a firm of market salesmen draws up, according to custom, a series of cheques payable to customers of the firm, and gets one of the partners to sign them. Instead of posting the cheques to the payees, he forges their signatures, and cashes them from time to time with a tradesman with whom he deals. The cheques are collected by the tradesman's bank. The drawers of the cheques can recover the amount thereof from the tradesman, for the payees were not fictitious.⁸⁶

7. A is induced by X to draw a cheque in favour of C, whom X fraudulently represents as having certain shares which A wishes to acquire. C has no such shares, and X, instead of forwarding the cheque to him, forges his name and pays the cheque in to his own bankers, who receive the amount. A, the drawer, can recover the amount from the bankers, for C is not a fictitious payee, although the details about him and his property were fictitious.⁸⁷

8. X fraudulently alters the payee's name on a cheque, and indorses it in the

⁸¹ *Hunter v. Jeffery* (1797), Peake Ad. Cas. 146; 170 E. R.; *aliter*, if the acceptor knew the facts: *Gibson v. Minet* (1791), 1 H. Bl. 569; 126 E. R., H. L.; *Gibson v. Hunter* (1794), 2 H. Bl. 288; 126 E. R.; cf. *Vagliano v. Bank of England* (1889), 23 Q. B. D. at p. 268, where the cases are reviewed.

⁸² *Phillips v. im Thurn* (1865), 18 C. B. (n.s.) 694; 144 E. R., on demurrer; see same case, L. R. 1 C. P. 463, on evidence.

⁸³ *Ashpitel v. Bryan* (1863), 32 L. J. Q. B. 91; affirmed by Ex. Ch. 38 L. J. Q. B. 823; cf. *Vagliano v. Bank of England* (1889), 23 Q. B. D. at p. 260, C. A.

⁸⁴ *Bank of England v. Vagliano*, [1891] A. C. 107, H. L., reversing *Vagliano v. Bank of England* (1889), 23 Q. B. D. 243, C. A. See this case discussed by the author, 7 L. Q. R. 216, and by Mr. Butterworth, 10 L. Q. R. 40; Paget on Banking, 2nd ed., pp. 48-53. See below, at p. 24.

⁸⁵ *Clutton v. Attenborough*, [1895] 2 Q. B. 707, C. A.; affirmed *ibid.*, [1897] A. C. 90, H. L.

⁸⁶ *Vinden v. Hughes*, [1905] 1 K. B. 795; followed in an Irish case, *Town Advance Co. v. Provincial Bank of Ireland*, [1917] 2 Ir. R. 421.

⁸⁷ *North and South Wales Bank v. Macbeth*, [1908] A. C. 187, H. L., affirming *Macbeth v. N. and S. Wales Bank*, [1905] 1 K. B. 18, C. A.

altered name to D, who takes it in good faith. The payee is not fictitious, and D cannot recover from the drawer since the alteration in the cheque cannot make a real payee fictitious.⁸⁸ But if the fraudulent alteration had been made by the drawer's clerk before the drawer signed the cheque it might well have been otherwise.⁸⁹

9. An instrument in the form of a cheque payable to "cash", is not a bill payable to a fictitious person, since "cash" cannot be a person, but it is a document payable to bearer.⁹⁰

This sub-s. was inserted in committee in place of a clause working out in detail the effect of the cases. The words "or non-existing" seem superfluous; but they were intended to cover the case given in Illustration 8. The New York Negotiable Instruments Law, § 28, provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable*; or when the name of the payee does not purport to be the name of any person", e.g., when a cheque is drawn in the form "Pay Cash" or "Pay Sundries".

Before the Act it appears that even a holder in due course could enforce a bill which he held under the indorsement of a fictitious person, only against parties privy to the fiction; "the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognisant of the fictitious character or non-existence of the supposed payee".⁹¹

The Act has swept away the former qualifications, and now any holder who could recover if the bill were drawn payable to bearer can recover if it be payable to a fictitious payee. When a bill is payable to the order of a fictitious person it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text-books the Act puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person, but in the hands of another, is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bona fide* holder would be justified in indorsing it in the payee's name. It might have been better if the Act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of anyone who should indorse it, or, in other words, as indorsable by the bearer. Though the bill may be payable to bearer, it is clear that a holder who is party or privy to any fraud acquires no title. What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person shall not affect the rights of a person who has received or paid it in good faith.

⁸⁸ *Goldman v. Cox* (1924), 40 T. L. R. 744, C. A.

⁸⁹ *Cf. Vinden v. Hughes, supra.*

⁹⁰ *North and S. Insee. Corp. v. Nat. Prov. Bank*, [1986] 1 K. B. 328.

⁹¹ *Vagliano v. Bank of England* (1889), 23 Q. B. D. 248, at p. 260, per Bowen, L.J., reviewing the cases; Story on Bills, §§ 56, 200.

Vagliano's Case, cited in Illustration 4, gave rise to a great conflict of judicial opinion as to whether C & Co. were fictitious payees. The Courts below held that, inasmuch as there was a real firm of C & Co., the payees were not fictitious; but according to the judgment of the majority of the Lords, C & Co. were fictitious payees, and for this reason—the bill was a forgery throughout, and the real C & Co. never were, and never were intended to be, the payees. If by any means they had obtained the bill, they would not have been entitled to it, and their indorsement could have conveyed no title against the supposed drawer whose name was forged. It was as if the forger had inserted the first name he came across in a directory.⁹² It is submitted by the present editor that the test of the fiction or reality of a payee is not absolute; indeed, it cannot be absolute, but is relative to the knowledge and intention of the author of the instrument. This means (other than where the drawer's signature is forged or where the drawer is also fictitious) the drawer; in those other cases it means the forger of the signature or the manufacturer of the name. It seems more than probable that nearly every combination of names (even some which seem the most fantastic) put together however casually or with whatever ingenuity in the hope of achieving the unique will find some individual so called; every bullet has its billet.⁹³

The signature of a fictitious person must be distinguished from (a) the forged signature of a real person, and (b) the signature of a real person using a fictitious name—for instance, John Smith may trade as "The Birmingham Hardware Co.", and sign accordingly.⁹⁴ If a person, with intent to defraud, signs a bill in a fictitious name, he may thereby make a false document and so be guilty of forgery: see Forgery Act, 1913 (8 & 4 Geo. 5, c. 27), s. 1.

S. 84 (8) applies the provisions of the Act relating to a payee (with the necessary modifications) to an indorsee under a special indorsement. As to the estoppels which bind an acceptor as such, see s. 54 (2); and as to the estoppels binding a drawer or indorser as such, see s. 55. For estoppel by negligence, see note to s. 24.

Before the Act, it was held that where a bill was drawn payable to a deceased person in ignorance of his death, his personal representatives might enforce the bill, and there is nothing in the Act to derogate from this ruling.⁹⁵

In France the insertion of a fictitious payee constitutes a *supposition*

⁹² *Bank of England v. Vagliano*, [1891] A. C. 107, H. L., judgment of Lord Herschell; and see judgment of Lord Esher in Court below, 23 Q. B. D. at p. 247, and 7 L. Q. R. 216 and 10 L. Q. R. 40.

⁹³ *Cf. Hulton & Co. v. Jones*, [1910] A. C. 20 (the test of applicability of a defamatory statement to an individual lies in the not unreasonable interpretation of those to whom the statement is published).

⁹⁴ See, too, *Schultz v. Astley* (1896), 2 Bing. N. C. 544; 182 E. R., where Thomas Wilson Richardson drew a bill as Thomas Wilson.

⁹⁵ *Murray v. East India Co.* (1821), 5 B. & Ald. 204; 106 E. R.

de nom, which avoids the bill in the hands of any party with notice thereof.⁹⁶ Under most of the continental codes it is expressly provided that the payer (acceptor or his banker) is not bound to verify the genuineness of the indorsement⁹⁷; the reason being that he has no means of doing so.

What bills are negotiable.

8. (1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

ILLUSTRATIONS

1. A bill is drawn, "Pay this first of exchange to the order of C only", and is further crossed "Not negotiable". It is not negotiable and therefore an action by D as holder and indorsee fails since the bill was incapable of being transferred to him.⁹⁸

2. A note is drawn in the form, "I promise to pay C only". It is not negotiable.

3. A draws a cheque, making it payable to C or order, and crosses it "Account of C, National Bank, Dublin". C indorses it and sends it to his bankers (the National Bank), who credit him with the amount. The bankers can maintain an action against A, the drawer, if the cheque is stopped.⁹⁹

4. The acceptor of a bill payable to drawer or order when accepting it writes over his acceptance the words "in favour of A (the drawer) only", and the words "or order" are struck out. This may be construed as a mere memorandum, and the negotiability of the bill is not restricted.¹

This sub-s. must be read with sub-s. (4). The foreign codes do not recognise bills which are not negotiable in their origin. As to when a bill negotiable in its origin ceases to be negotiable, see ss. 85 and 86.

As to the special statutory meaning attaching to "not negotiable" on a crossed cheque, see s. 81. See note on p. 818 for the effect of the words "a/c payee" on a cheque.

(2) A negotiable bill may be payable either to order or to bearer.

Bearer.

(3) A bill is payable to bearer which is expressed to be

⁹⁶ Nougner, §§ 277, 281—288.

⁹⁷ See Italian Code, Art. 287; German Exchange Law, Art. 36.

⁹⁸ *Hibernian Bank, Ltd. v. Gysin and Hanson*, [1889] 1 K. B. 483, C. A., applying a dictum of Fry, L.J., in *National Bank v. Silke*, [1891] 1 Q. B. at p. 439. S. 81 deals only with cheques crossed "Not negotiable", and not with other bills so marked or crossed.

⁹⁹ *National Bank v. Silke*, [1891] 1 Q. B. 435, C. A. The judgments go beyond what was necessary for the decision of the case, namely, that when the cheque had been duly credited to the payee's account the banker has the ordinary rights of a banker who has credited his customer's account with the amount of a cheque.

¹ *Decroix v. Meyer*, [1891] A. C. 520, H. L.; *alter*, it seems, if the acceptance had run, "accepted in favour of C only".

so payable, or on which the only or last indorsement is an indorsement in blank.

See "bearer" defined by s. 2. This sub-s. alters the law. It was intended to bring the law into accordance with the mercantile understanding by making a special indorsement control a previous indorsement in blank. Before the Act it was held that once a bearer bill always a bearer bill, and so where a bill was indorsed in blank, its negotiability to bearer was unaffected by a subsequent special indorsement,² though the special indorser was liable on his indorsement only to such parties as made title through it.³

Sec s. 84 as to blank indorsements, and converting blank indorsements into special indorsements.

A bill payable "to C or bearer" is payable to bearer, but a bill payable "to bearer (C) or order" is presumably payable to order. A bill payable "to C and others or bearer" if marked "account payee", is not payable to bearer.⁴ An instrument drawn "pay cash or order", although not a bill or cheque, is a valid mandate to the bank on which it is drawn to pay bearer without any indorsement.⁵

Order.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

ILLUSTRATIONS

1. A bill is drawn in the form "pay C one hundred pounds". This, in legal effect, is a bill payable to C or order.

2. See Illustration 1 to s. 8 (1).

This sub-s. alters the law. Before the Act it was held in England that a bill or note drawn payable to a specified person without the addition of the words authorising transfer, e.g., "Pay C", was not negotiable.⁶ The Act adopted the Scottish rule that a bill or note was negotiable unless it contained words prohibiting transfer, as, for instance, "Pay C only".

² *Walker v. Macdonald* (1848), 2 Exch. 527; 154 E. R.

³ *Smith v. Clarke* (1794), Peake 228; 170 E. R.; Story, § 207. The New York Negotiable Instruments Law, § 70, re-enacts the common law rule.

⁴ *House Property Co. v. London County and Westminster Bank* (1915), 84 L. J. K. B. 1846.

⁵ *North and S. Insee. Corp. v. Nat. Prov. Bank*, [1936] 1 K. B. 828.

⁶ *Plimley v. Westley* (1835), 2 Bing. N. C. at p. 251; 182 E. R.; *Whyte v. Heylman* (1859), 24 Pennsylvania R. 143; *aliter*, as to an indorsement, *Edie v. East India Co.* (1761), 2 Burr. 1216; 97 E. R.; cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 357.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

This sub-s. is declaratory.⁷ It provides that a bill payable "to the order of C" is in legal effect payable "to C or order", i.e., that C can make an effective demand for payment without giving a responsible indorsement. C, of course, is bound to give a receipt to the same extent as any other person who receives payment of money. See an indorsement by way of receipt distinguished by Byles, J., from an ordinary indorsement which is in the nature of a guarantee.⁸

Sum payable.

9. (1) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

- (a) With interest.
- (b) By stated instalments.
- (c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.⁹
- (d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill.

ILLUSTRATIONS

1. Bill for £100 payable "with lawful interest". Valid.¹⁰
2. Bill for £100 payable by two equal instalments due January 1 and July 1. Valid.¹¹
3. Bill for £100 payable "by instalments", not specifying dates or amounts. Invalid.¹²
4. Bill for £100 payable "by ten equal instalments, payable, etc., all instalments to cease on the death of X". Invalid.¹³

⁷ *Smith v. M'Clure* (1804), 5 East 476; 102 E. R.; cf. *Harvey v. Cane* (1876), 34 T. L. 64.

⁸ *Keane v. Beard* (1860), 8 C. B. (N.S.) at p. 382; 141 E. R.; cf. Paget on Banking, 2nd ed., p. 46. As to stamp exemption, see p. 365.

⁹ *Carlon v. Kenealy* (1843), 12 M. & W. 189; 152 E. R.; cf. New York Negotiable Instruments Law, § 21.

¹⁰ *Cf. Warrington v. Early* (1858), 2 E. & B. 763; 118 E. R.; 23 L. J. Q. B. 47; but see a Scots case (*Lamberton v. Aiken* (1899), 1 Oth. of Sess. Cas. 189), where a note for £250, "together with any interest that may accrue thereon", was held invalid, *sed qu.* Cf. *Re Commercial Bank* (1867), 86 Ch. D. at p. 529.

¹¹ *Carlon v. Kenealy* (1843), 12 M. & W. 189; 152 E. R.; *Gashin v. Davis* (1860), 2 F. & F. 294; 175 E. R. Days of grace must be added to the instalment-due dates: *Oridge v. Sherborne* (1848), 11 M. & W. 374; 152 E. R.

¹² *Moffatt v. Edwards* (1841), Car. & M. 16; 174 E. R.

¹³ *Worley v. Harrison* (1835), 3 A. & E. 669; 111 E. R.

5. Bill for £100, or bill for 1,000 francs, payable "at exchange as per last indorsement". Valid.

6. Bill for £100 "payable in Paris or London, at the choice of the holder, according to the course of exchange upon Paris". Valid.¹⁴

7. Cheque drawn in England on a London bank payable in francs, but not indicating in any way how the exchange is to be calculated. Valid.¹⁵

By s. 8, a bill must be drawn for "a sum certain" in money. When the rate of interest is not expressed, five per cent. is understood.¹⁶ Since the abolition of the Usury Laws there has been no limit in England of the rate of interest the parties may agree. In many American States and continental countries usury laws are still in force. Interest proper, that is to say, interest reserved by the instrument, must be distinguished from interest by way of damages, as to which see s. 57 (3). As to money-lenders and unconscionable bargains, see p. 85.

The indorsement of a rate of exchange without authority is a material alteration which may avoid a bill.¹⁷ See a statement of the practice as to the sale of foreign bills, and the mode of fixing the exchange in *Suse v. Pompe*.¹⁸

In the absence of a contrary indication in the bill, when a bill is drawn in one country and payable in another, and the sum payable is expressed in the currency of the former, the amount the holder is to receive must be calculated according to the rate of exchange on the day that the bill is payable.¹⁹ For fiscal purposes a different rule necessarily prevails (see s. 6 of the Stamp Act, 1891, on p. 346), which makes the date of the instrument the critical date for determining the amount of the stamp.

In the old case of *Da Costa v. Cole*,²⁰ a bill was drawn in England on Portugal, and expressed to be payable in "rees", that is, in Portuguese currency. Between the time of issue and payment the Portuguese currency was depreciated. It was held that the holder was entitled to be paid according to the former value. This decision seems inconsistent with s. 72 (4), as to bills expressed to be payable in foreign currency.²¹

Uncertain sum.—None of the following instruments is valid as a bill or note, not being for a sum certain within the meaning of s. 8 (whatever other legal effect it may have), namely: An order to

¹⁴ Cf. *Pollard v. Harries* (1808), 8 B. & P. 335; 127 E. R., promissory note.

¹⁵ *Cohn v. Bouiken* (1920), 36 T. L. R. 767. As to foreign bills, see s. 72 (4).

¹⁶ Cf. *Re Commercial Bank* (1887), 36 Ch. D. at p. 529.

¹⁷ *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340. See s. 64 as to alterations.

¹⁸ (1860), 8 C. B. (N.S.) at p. 542; 141 E. R.; 30 L. J. C. P. 75.

¹⁹ See s. 72 (4), and *Hirschfeld v. Smith* (1866), L. R. 1 C. P. at p. 353; Belgian Code, Art. 83.

²⁰ *Da Costa v. Cole* (1868), Skinner 272; 90 E. R., holder v. drawer.

²¹ And cf. *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525 (postponement of payment by *ex post facto* legislation).

pay C "£100 and all other sums which may be due to him"²²; an order to pay C "the proceeds of a shipment of goods value £2,000, consigned by me to you"²³; an order to pay C "the balance due to me for building the Baptist College Chapel"²⁴; a promise to pay C "£100 and the demands of the Sick Club"²⁵; a promise to pay "£100 and all fines according to rule".²⁶

Discrepancy in words and figures.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.²⁷

ILLUSTRATIONS

1. A bill is drawn, "Pay to the order of C two hundred pounds". In the margin is superscribed £250. This is a bill for £200 only.²⁸

2. Bill on sufficient stamp for "one hundred pounds", with £10 in the margin. The sum payable is £100.²⁹

3. A bill is drawn, "Pay to the order of C one hundred". In the margin is inserted £100. This is a bill for £100.³⁰

4. Bill in the form, "Pay to my order twenty-five, ten shillings". This is sufficient as a bill for £25 10s.³¹

5. A partner in a firm draws a cheque to bearer, not filling in the amount in the space for words, but putting £2 in the space for figures. A confidential clerk misappropriates the cheque, writes "one hundred and twenty pounds" in the space for words, and alters the "2" into "120". If the bank pays this cheque to the clerk it can debit the firm's account with £120.³²

German Exchange Law, Art. 5, and some other continental codes, provide, that if the amount be expressed both times in figures or both times in words, and there is a discrepancy, the smaller sum is the amount payable.

If a bill ran simply, "Pay to my order £—", evidence would be inadmissible to show the sum for which it was intended to be drawn³³; but an instrument in this form would be a *prima facie* authority to the holder to fill in any sum the stamp would cover, see

²² *Smith v. Nightingale* (1818), 2 Stark. 875; 171 E. R.

²³ *Jones v. Simpson* (1828), 2 B. & C. 818; 107 E. R.

²⁴ *Crowfoot v. Gurney* (1892), 9 Bing. 872; 181 E. R.

²⁵ *Bolton v. Dugdale* (1888), 4 B. & Ad. 619; 110 E. R.

²⁶ *Ayrey v. Fearnside* (1888), 4 M. & W. 168; 150 E. R.

²⁷ Cf. New York Negotiable Instruments Law, § 36 (1), and cases cited in Crawford's edition.

²⁸ *Saunderson v. Piper* (1889), 5 Bing. N. C. 425; 182 E. R.; German Exchange Law, Art. 5.

²⁹ Cf. *Garrard v. Lewis* (1892), 10 Q. B. D. 80, at pp. 84, 85; and as to history of marginal figures, see *per* Bowen, L.J., at p. 92; and cf. *Heeney v. Addy*, [1910] 2 Ir. R. 688 (marginal figures only); Story, § 42.

³⁰ *R. v. Elliot* (1777), 1 Leach C. C. 175; 168 E. R.

³¹ *Phipps v. Tanner* (1883), 5 C. & P. 488; 172 E. R.

³² [1918] A. C. 777, H. L.

³³ *Norwich Bank v. Hyde* (1889), 18 Connecticut 879; cf. *Saunderson v. Piper* (1889), 5 Bing. N. C. at p. 481; 182 E. R.

s. 20 and *London J. S. Bank v. Macmillan*.³⁴ In the absence of such a statutory provision, a document from which the amount payable was omitted would have no legal effect without proof of an agent's authority to fill it up for the amount ultimately specified or unless an estoppel arose from conduct.

Calculation of interest.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof.³⁵

ILLUSTRATIONS

1. Bill for £200, payable six months after date with interest. The sum payable at maturity is £205.³⁷

2. B makes a note expressed to be payable with interest one year after his death. Interest runs from the date of the note.³⁶

See "issue" defined by s. 2, p. 7. Interest proper, payable by the instrument itself, must be distinguished from interest by way of damages payable on its dishonour.³⁷ As to the latter, see s. 57. The interest reserved does not affect the stamp.³⁸

Bill payable on demand.

10. (1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.³⁹

Sub-s. (1) (a) reproduces the effect of the repealed 34 & 35 Vict. c. 74. Before that enactment it was doubtful whether or not days of grace attached to bills expressed to be payable "at sight" or "on presentation". By virtue of s. 14, days of grace do not attach to bills payable on demand.

³⁴ Cf. New York Negotiable Instruments Law, § 36 (2).

³⁵ *Doman v. Dibdin* (1836), R. & M. 818; 39 E. R.

³⁶ *Roffey v. Greenwell* (1839), 10 A. & E. 222; 118 E. R.; cf. *Richards v. Richards* (1831), 2 B. & Ad. 447; 109 E. R., before the Married Women's Property Act.

³⁷ Cf. *Ex p. Charman, Re Gloggett*, [1887] W. N. p. 184, C. A.

³⁸ *Prussing v. Ing* (1821), 4 B. & Ald. 204; 106 E. R.

³⁹ New York Negotiable Instruments Law, § 26, and cases cited in Crawford's edition.

A post-dated cheque may be stamped as a bill payable on demand ⁴⁰ (and when the time arrives, it is, of course, payable without grace); but for many purposes it is equivalent to a bill payable after date.⁴¹ By s. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), p. 857, bills of exchange expressed to be payable at a period not exceeding three days after or sight may be stamped as bills payable on demand. For stamp purposes certain documents, which would not be bills within the meaning of this Act, require to be stamped as "bills payable on demand". See s. 82 of the Stamp Act, 1891, p. 848.

As to when instruments payable on demand are overdue, see s. 86 (3); see s. 45 (2) for their presentment for payment and s. 60 as to their forged indorsement. S. 78 (cheque) and s. 86 (note) for other instruments payable on demand.

Before the enactment of sub-s. (2), the English law on the subject dealt with was very obscure; the sub-s. followed cases decided in the United States. For the rights of the transferee of an overdue bill against parties liable thereon before its maturity, see s. 86. Under German Exchange Law, Art. 16, the indorser of a protested bill incurs no mercantile engagement. See, too, Italian Code, Art. 260.

Bill payable at a future time.

11. A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable ⁴²—

- (1) At a fixed period after date or sight.⁴³
- (2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.⁴⁴

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.⁴⁵

ILLUSTRATIONS

The following are bills:—Orders to pay,

1. Ten days after the death of X.⁴⁶
2. Two months after H.M. ship *Swallow* is paid off.⁴⁶

⁴⁰ *Gatty v. Fry* (1877), 2 Ex. D. 285; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715, C. A.; Paget on Banking, 4th ed., p. 110.

⁴¹ See note to s. 13 (2); and *Forster v. Mackreth* (1867), L. R. 2 Ex. 168.

⁴² By s. 3, a bill must be payable either on demand or at a fixed or determinable future time.

⁴³ See s. 14 (2) and (3) as to fixing the due date of such bills in ordinary cases, and s. 65 (5) as to the due date when accepted for honour.

⁴⁴ See *Colehan v. Cooke* (1742), Will. 898, at p. 899; 125 E. R.; *Carlos v. Fancourt* (1794), 5 T. R. 482; 101 E. R.

⁴⁵ New York Negotiable Instruments Law, § 28.

⁴⁶ *Colehan v. Cooke* (1742), *supra*.

3. On January 1, when X comes of age.⁴⁷
4. One year after notice.⁴⁸
5. One year after my death.⁴⁹
6. Two months after demand in writing.⁵⁰
7. Five years after the opening of the S. Railway.⁵¹ (?)
The following are not bills.—Orders to pay,
8. When I marry X.⁵²
9. When I am in good circumstances.⁵³
10. Thirty days after the arrival of ship *Swallow* at Calcutta.⁵⁴
11. Ninety days after sight, or when realised.⁵⁵
12. Ninety days after the dissolution of partnership between C and X and the settling of the books.⁵⁶

“Certainty”, says Ashhurst, J., “is a great object in negotiable instruments, and unless they carry their own validity on the face of them they are not negotiable. On that ground bills which are only payable on a contingency are not negotiable, because it does not appear on the face of them whether or not they will ever be paid.”⁵⁷ Under the continental codes, such forms as are given in Illustrations 1 to 7 would probably be invalid. A bill, however, may be made payable at a particular fair or market (*en foire*), though the day on which it will be held is not known. Such bills seem to have been anciently known in England as “*billæ nundinales*”.⁵⁸ Bills and notes payable “*en foire*” are said to be now obsolete everywhere except in Russia. See further notes to s. 78 (cheques).

Omission of date in bill payable after date, or acceptance after sight.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly:

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently

⁴⁷ *Goss v. Nelson* (1787), 1 Burr. 226; 97 E. R.

⁴⁸ *Clayton v. Gosling* (1826), 5 B. & C. 360; 108 E. R.

⁴⁹ *Roffey v. Greenwell* (1839), 10 A. & E. 222; 113 E. R.

⁵⁰ *Price v. Taylor* (1860), 5 H. & N. 540; 29 L. J. Ex. 381; 157 E. R.

⁵¹ *Cf. Ex p. Gibson* (1869), L. R. 4 Ch. 662. No objection raised; this is quite clearly invalidated as a bill by the terms of s. 10. See *Blackman v. Lehman* (1879), 35 Amer. R. 57, where a similar order was held to be no bill.

⁵² *Pearson v. Garret* (1869), 4 Mod. 242; 87 E. R.

⁵³ *Ex p. Tootell* (1798), 4 Ves. 372; 31 E. R.

⁵⁴ *Palmer v. Pratt* (1824), 2 Bing. 185; 120 E. R.

⁵⁵ *Alexander v. Thomas* (1851), 16 Q. B. 383; 117 E. R.

⁵⁶ *Sackett v. Palmer* (1867), 25 New York R. 179.

⁵⁷ *Carlos v. Fancourt* (1794), 5 T. R. at p. 486; 101 E. R.

⁵⁸ *Cf. Colehan v. Cooke* (1742), Willes, at p. 399; 125 E. R. See French Code, Art. 133; German Exchange Law, Art. 33; Italian Code, Art. 252.

comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date."⁹⁰

See "issue" and "holder", defined by s. 2; "good faith" by s. 90, and "holder in due course" by s. 29.

The section does not apply as between the immediate parties where a wrong date is inserted although in good faith if in fact this is a date contrary to a prior agreement settling the date from which the bill is to run, and consequently in such a case the bill was void by the operation of s. 64, and this although the alteration in the date was in favour of the party sued on it.⁹¹

This section with its inelegantly phrased proviso was added in committee. Before its enactment the English law on the subject dealt with was very obscure. When a bill comes from a foreign country undated the holder frequently cannot know the exact intended date. He knows when the mail left, but does not know on what previous day the bill was issued. The present section throws any possible inconvenience that may arise on the careless party who omitted to date the bill or acceptance. In Scotland, under the 19 & 20 Vict. c. 60, s. 10, now repealed, oral evidence might be given to prove the true date. See s. 20 for the general rule as to material omissions in a bill, and the consequences of supplying them, and s. 64 as to material alterations.

French Code, Art. 122, provides that if a bill be payable after sight and the acceptance be not dated, time runs from the date of the bill; but see *Nouguiet*, § 498. Article 115 of the Netherlands Code contains a similar provision.

Presumption as to date being true date.

13. (1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.⁹²

Ante-dating, post-dating, and Sundays.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.⁹³

⁹⁰ New York Negotiable Instruments Law, § 82.

^{90a} *Foster v. Driscoll*, [1929] 1 K. B. 470.

⁹⁰ New York Negotiable Instruments Law, § 80, see Crawford's edition. If the date is an impossible one, the law will adopt the nearest possible day, e.g., September 30, when the bill bears date September 31.

⁹¹ Cf. New York Negotiable Instruments Law, § 31.

ILLUSTRATIONS

1. B gives a blank acceptance in 1857. The drawer, by inadvertence, fills it up as a bill dated 1850. The holder can recover from the acceptor.⁶²

2. A bill, bearing date May 1, is indorsed by the payee to D. It appears that the payee died in the previous April. D may show that the bill was post-dated, and he can then recover from the parties liable thereon.⁶³

3. The payee of a post-dated cheque pays it in to his bankers, who credit him with the amount. If the cheque is stopped, the bankers can recover the amount from the drawer.⁶⁴

Sub-s. (1) declares the common law.⁶⁵

The *prima facie* presumption arising from the date may be rebutted, e.g., for the purpose of ousting the Statute of Limitations.⁶⁶ Inasmuch as the bankruptcy laws are expressly saved by s. 97 (1), the Act presumably does not affect the rule that when a bill is tendered in bankruptcy proceedings as evidence of the petitioning creditor's debt, the date of the bill must be confirmed by independent evidence.⁶⁷

The Acts which for fiscal purposes prohibited the post-dating of cheques or bills payable on demand were repealed by the Stamp Act, 1870.⁶⁸ To ascertain whether under the stamp law the instrument is admissible in evidence only the terms of the instrument itself need be regarded.⁶⁹ That a cheque is post-dated does not make it irregular within the meaning of s. 29 (1) so as to charge the holder with equities of which he had no notice, that is to say, the holder of a post-dated cheque may nevertheless be its holder in due course.⁷⁰ For many purposes a post-dated cheque is equivalent to a bill payable after date,⁷¹ and it is clear that if a banker pays a post-dated cheque before its due date he does so at his own risk. The drawer of a post-dated cheque is under no obligation to stop payment of it for the benefit of a third person, for example, the payee's trustee in bankruptcy.⁷²

To ante-date a bill or note in order to defraud a third party may amount to forgery.⁷³

⁶² *Armfield v. Allpost* (1857), 27 L. J. Ex. 42.

⁶³ *Pasmore v. North* (1811), 13 East 517; 104 E. R.; *Usher v. Dauncey* (1814), 4 Camp. 97.

⁶⁴ *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715, C. A.; cf. *Robinson v. Benkel* (1913), 29 T. L. R. 475 (indorsee v. indorser of post-dated cheque originally given for losses at cards).

⁶⁵ *Roberts v. Bethell* (1852), 12 C. B. at p. 778; 138 E. R.

⁶⁶ Cf. *Montague v. Perkins* (1853), 22 L. J. C. P. 187.

⁶⁷ Cf. *Anderson v. Weston* (1840), 6 Bing. N. C. at p. 301; 133 E. R. The contrary seems clearly arguable in spite of the wide terms of s. 97 (1).

⁶⁸ *Gatty v. Fry* (1877), 2 Ex. D. 265. See *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715, C. A., decided on the Stamp Act, 1891.

⁶⁹ *Ibid.*; and *Bull v. O'Sullivan* (1871), L. R. 6 Q. B. 209, at p. 218.

⁷⁰ *Hitchcock v. Edwards* (1889), 60 L. T. 636; *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715, C. A.; *Robinson v. Benkel* (1913), 29 T. L. R. 475.

⁷¹ *Farster v. Mackreth* (1837), L. R. 2 Ex. 163.

⁷² *Ex p. Rickdale* (1882), 19 Ch. D. 409, C. A.

⁷³ Forgery Act, 1913 (8 & 4 Geo. 5, c. 27), s. 1; *R. v. Ritson* (1889), L. R. 1 C. C. R. 200 (deed). As to bills which were ante-dated to defraud creditors, see *Re Gomerall* (1875), 1 Ch. D. 137, C. A.; *Jones v. Gordon* (1877), 2 App. Cas. 625.

In *Begbie v. Levi*, the Court seemed to think that a bill issued on a Sunday would be void in the hands of a holder with notice, but they suggested qualifications.⁷¹ The Act disposes of this point by removing the alleged defect.

Computation of time of payment.

14. Where a bill is not payable on demand," the day on which it falls due is determined as follows:—

- (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—

Days of grace.

- (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day," the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;
- (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday") under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

ILLUSTRATIONS

Subject to the proviso:—

1. A note dated January 31 is payable "without grace" one month after date. It is due on February 28. A similar note, dated January 1, would be due on February 1.⁷²

2. A note for £100 is made payable by two equal instalments, on January 1 and February 1. The instalments fall due on January 4 and February 4.⁷³

3. A bill dated January 1 is payable thirty days after date. It is due on February 3.

⁷² (1880), 1 Cr. & J. 180; 148 E. R.

⁷³ As to when a bill is payable on demand, see s. 10.

⁷⁴ As to the law before the Act, see Chitty on Bills, 10th ed., p. 262.

⁷⁵ Christmas Day and Good Friday are bank holidays in Scotland, not common law holidays.

⁷⁶ Cf. *Roehner v. Knickerbocker Life Ass. Co.* (1875), 68 New York R. 160.

⁷⁷ *Oridge v. Sherborne* (1843), 11 M. & W. 374; 152 E. R.

4 A non negotiable note, not payable on demand, is entitled to days of grace.⁵⁰

5. A bill dated November 28, a bill dated November 29, and a bill dated November 30, each being payable three months after date, all fall due on March 3, when February has but twenty eight days. If February has twenty-nine days (leap year) the bill of November 28 falls due on March 2.

6 A bill is dishonoured by non payment on the last day of grace. No right of action till the next day.⁵¹

7. Note payable by instalments, the whole sum to become due if any instalment is not "punctually" paid. This does not exclude days of grace on the instalments.⁵²

It is believed that all countries now use the New Style, or Gregorian, Calendar, even those where the State religion is that of the Greek Church, e.g., Bulgaria, Rumania and Greece. Russia adopted the Gregorian Calendar in 1917, and Yugoslavia did so on achieving her place in international polity in 1919; and Greece in 1928; see p. 240.

A suggestion to abolish days of grace, to accord with many foreign laws, was made in committee but withdrawn. The number of days of grace allowed in different countries differed considerably, but it is believed that they have now been abolished in all countries except England and parts of the Empire, and some States in the United States.⁵³ As the name implies, days of grace were in origin a matter of favour; they have long been a matter of right. Presentment for payment on the second day of grace is invalid.⁵⁴ The allowance of days of grace is regulated by the *lex loci solutionis*, irrespective of the country where the bill is drawn: see s. 72 (5).

As to the term "business day", see s. 92. It excludes both statutory and common law holidays.

It was suggested in committee that the effect of statutory and common law holidays should be assimilated, and that when a bill fell due on a non-business day it should be payable in all cases on the succeeding business day; but this was opposed by the bankers. It was said that when two holidays came together it was convenient that the due date of some bills should be thrown back, and of others thrown forward, in order to obviate too great a press of business on any one day. This argument has lost its force now that early closing on Saturday has become general. Moreover, Saturday is the Jewish Sabbath. In no country except the United Kingdom is any distinction drawn between common law and statutory holidays. In Scotland, Christmas Day and Good Friday are bank holidays, but it was agreed to assimilate Scots law to English law as regards bills

⁵⁰ *Smith v. Kendall* (1794), 6 T. R. 123; 101 E. R.

⁵¹ *Kennedy v. Thomas*, [1894] 2 Q. B. 759, C. A.

⁵² *Schaperien v. Morris* (1921), 37 T. L. R. 366.

⁵³ See French Code, Art. 135; German Exchange Law, Art. 93; Italian Code, Art. 290; New York Negotiable Instruments Law, § 145, and notes thereto in Crawford's edition, specifying the other States which have abolished days of grace.

⁵⁴ *Wiffen v. Roberts* (1795), 1 Esp. 262; 170 E. R.

falling due on those days. In assimilating the law of the two countries, one case appears to have been lost sight of, namely, when Christmas Day falls on Saturday; in such case it appears from the latter part of clause (b) that bills falling due on the Sunday in Scotland would be payable on the succeeding business day, while in England they would be payable on the preceding business day.

Usances.—Formerly foreign bills were sometimes drawn payable at one or more usances. “Usance” means customary time and is the time for payment as fixed by custom, having regard to the place where the bill is drawn and the place where the bill is payable. Thus, if the usance between London and Amsterdam is one month, a bill drawn in Amsterdam dated January 1, and payable in London “at double usance”, falls due on March 4.⁸⁵ It was stated at The Hague Conferences that the practice of drawing bills at “usance”, instead of after date or sight, is now everywhere obsolete. But in mercantile language, where it is the practice in a particular trade to draw bills at a particular currency, *e.g.*, ninety days after sight, this currency is often referred to as the usance of that trade.

After date or sight bills.

- (2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.⁸⁶
- (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.⁸⁷

Month.

- (4) The term “month” in a bill means calendar month.⁸⁸

ILLUSTRATIONS

1. The holder of a foreign bill, payable sixty days after sight, makes an agreement that if it be dishonoured by non-acceptance, he will re-present it for payment at maturity. Acceptance is refused. The time of payment must be calculated from

⁸⁵ Cf. *Mutford v. Walcot* (1898), 1 Ld. Raym. 574; 91 E. R.; Nougues, § 144.

⁸⁶ *Campbell v. French* (1795), 6 T. R. at p. 212; 101 E. R.; Story, § 829; cf. German Exchange Law, Art. 32; New York Negotiable Instruments Law, § 146.

⁸⁷ *Campbell v. French* (1795), 6 T. R. 200; 101 E. R.; cf. s. 18 (3).

⁸⁸ *Webb v. Fairmaner* (1888), 8 M. & W. 473; 150 E. R.; French Code, Art. 132.

the day the bill was protested, and not from the day of presentment to the drawee for acceptance.⁸⁹

2. A bill is payable three months after sight. The acceptance bears date January 1. The bill is due on April 4.

8. Bill payable after sight is noted for non-acceptance on January 1. It is accepted *supra protest* on January 5. The time of payment must be calculated from January 1, not from January 5.⁹⁰

A bill presented for acceptance is usually left for twenty-four hours with the drawee, but the custom is for the acceptance to bear date the day of presentment, and not the day of return to the holder, e.g., a bill presented on a Saturday during business hours is accepted and returned on the Monday; the acceptance should bear date of the Saturday. The holder is probably entitled to this as a matter of right. Cf. s. 42, and notes thereto. Compare s. 18 (8) as to the acceptance of a bill which has previously been refused acceptance.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may think fit.

The referee in case of need is sometimes called the drawee in case of need, or simply the "case of need". A bill must be protested or noted for protest before it can be presented to the case of need (ss. 65, 67, 68). The concluding words of the section settled a moot point, whether presentment to the case of need is obligatory or optional in the United Kingdom. In some parts of the United States presentment is, perhaps, obligatory,⁹¹ and in India it is clearly obligatory.⁹² Under the continental codes presentment to the case of need is usually obligatory, but then it provided that the case of need must be in the same place where the bill is payable.⁹³ In England

⁸⁹ *Campbell v. French* (1795), 6 T. R. 200; 101 E. R.; cf. French Code, Art. 131; German Exchange Law, Art. 32. This is because the term "after sight" means or involves "after acceptance" or "after protest for non-acceptance", and not "after merely showing the bill to the drawee", i.e., sight implies some definite concomitant with the production of the bill, i.e., either acceptance or protest, *ibid.*, at p. 212. As a promissory note cannot be accepted, "after sight" in a note means after mere exhibition to the maker. *Sturdy v. Henderson* (1821), 4 B. & Ald. 592; 106 E. R.; cf. s. 89 (3).

⁹⁰ See s. 65 (5), which accords with custom, and overrides the *dictum* in *Williams v. Germaine* (1827), 7 B. & C. at p. 471; 108 E. R.

⁹¹ Story, § 65; but no American case is cited. The New York Negotiable Instruments Law, § 215, adopts the English section *verbatim*.

⁹² Indian Negotiable Instruments Act, s. 115.

⁹³ See Nonguier, § 244. The case of need is known in France as the *besoin* or *recommandataire*.

this is not so; for instance, a bill drawn on Liverpool often names a case of need in London. It may possibly be necessary in some cases to present to the case of need in England, in order to charge a foreign drawer or indorser in his own country, for an English statute is of course only binding in English Courts. However, in most countries the duties of the holder would be held to be regulated by the *lex loci solutionis*.

Special stipulations by drawer or indorser restricting liability.

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

(1) Negating or limiting his own liability to the holder :

ILLUSTRATION

The holder of a bill indorses it to D thus: " Pay D or order without recourse to me ", or " Pay D or order *sans recours* ",⁹⁴ or " Pay D or order at his own risk ",⁹⁵ or " Pay D or order without recourse, unless presented within 30 days ". The indorser thereby passes his interest to D, but negatives or limits his liability as an indorser.⁹⁶

Waiving holder's duties.

(2) Waiving as regards himself some or all of the holder's duties.

ILLUSTRATION

C, the holder of a bill, indorses it to D, adding the words " notice of dishonour waived ". No subsequent party is obliged to give notice of dishonour to C.

An indorsement negating or limiting liability is sometimes called a qualified indorsement.⁹⁷ Compare ss. 88 and 85 as to conditional and restrictive indorsements.

It has been held in the United States that an indorser " without recourse " is responsible to the same extent that a transferor by delivery is responsible, *e.g.*, where the bill is a forgery⁹⁸; compare s. 58 (2) and (8). As to the ordinary liability of an indorser, see s. 55 (2); and as to the liability of a transferor by delivery, see s. 58. As to indorsements or guarantees by parties who have never been holders, see s. 56.

The provisions of this section are limited to the drawer or indorser. An acceptor may accept conditionally: see s. 19; but he cannot accept so as to make himself secondarily, and not primarily, liable on the

⁹⁴ *Goupy v. Harden* (1816), 7 Taunt. at p. 168; 129 E. R.

⁹⁵ *Rice v. Stearns* (1807), 3 Massachusetts R. 224.

⁹⁶ *Cf. Castrique v. Buttique* (1868), 10 Moore P. C. pp. 110—112, 117; 14 E. R.; German Exchange Law, Art. 14; Nougier, §§ 268—270.

⁹⁷ *Cf.* New York Negotiable Instruments Law, § 68.

⁹⁸ *Dumont v. Williamson* (1867), reported in England, 17 L. T. (N.S.) 71; *Hannum v. Richardson* (1875), 21 Amer. R. 162; New York Negotiable Instruments Law, § 118.

bill. Thus, where in Scotland a drawee accepted "as cautioner", it was held that this might be evidence that he was an accommodation acceptor, but that it did not alter his primary obligation to the holder to pay the bill.⁹⁹

An indorsement waiving the holder's duties relates only to the indorser's liability, and does not affect the negotiation of the bill. Such stipulations are resorted to when the payment of the bill is doubtful, and the drawer or indorser wishes to save expense in case of its return. In the United States it has been held that the indorsement in the above illustration dispenses with the necessity of notice to all subsequent indorsers¹; and in France a similar construction has been put on the phrases, "*Retour sans frais*", "*Retour sans protêt*", and "*Sans compte de retour*".² It is very doubtful whether the English Act would bear such an interpretation; such waiver is presumably limited to the obligations which the holder or indorser would otherwise owe to that indorser if he had not waived his rights.

Definition and requisites of acceptance.

17. (1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

ILLUSTRATIONS

1. Bill addressed to B. X writes an acceptance on it. X is not liable as acceptor.¹

2. Bill addressed to B. B accepts it. X also writes an acceptance on it. X is not liable as acceptor.⁴

3. Bill addressed to B. B accepts it, and before issue X backs it with his signature. X is not liable as acceptor.⁵

4. Bill addressed to the "Directors of the B Company, Limited". The acceptance is signed by two directors and the manager. The manager is not liable as acceptor.⁶

5. Bill addressed to B & Co. B, a partner in the firm, accepts it in the firm's name, adding also his own name. This is the acceptance of the firm, and not of B personally.⁷

6. Bill addressed to B and X. B alone accepts. B is liable as acceptor.⁸

7. Bill addressed to B & Co. X, a partner in that firm, accepts it in his own name. He is liable as acceptor.⁹

8. Bill addressed to B, who is a partner in the firm of X & Co. B accepts in the firm name. B is personally liable as acceptor.¹⁰

⁹⁹ 1 Bell, Com. 424 (7th ed.). Cf. *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 781; and Italian Code, Arts. 266, 268.

¹ Daniel, § 1090; *Parshley v. Heath* (1879), 31 Amer. R. 246.

² Nougier, § 259. The expression "*sans compte de retour*" also negatives the right to draw a re-draft.

³ *Davis v. Clarke* (1844), 8 Q. B. 16; 115 E. R.

⁴ *Jackson v. Hudson* (1810), 2 Camp. 147; 170 E. R. *Qu.* if X is liable as indorser? See *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 770.

⁵ *Steele v. M'Kinlay* (1880), 5 App. Cas. 754. As to X's liability as an indorser, see *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 635, H. L.

⁶ *Bull v. Morrell* (1840), 12 A. & E. 745; 118 E. R.

⁷ *Re Barnard, Edwards v. Barnard* (1886), 82 Ch. D. 447, C. A.

⁸ *Owen v. Von Uster* (1850), 10 C. B. 318; 138 E. R. See, too, s. 19 (2) (e).

⁹ *Owen v. Von Uster*, *supra*, and see s. 28 (2).

¹⁰ *Nicholls v. Diamond* (1853), 9 Exch. 154; 156 E. R.

9. Bill addressed to William B. His wife accepts it, signing the acceptance "Mary B." If he authorises her so to accept, or afterwards promises to pay the bill, he is liable as acceptor.¹¹

10. A bill is addressed to the B Company, Ltd. Two of the directors accept it, signing thus: "J. S. and H. T. directors of the B Co., Limited." This is an acceptance by the company.¹²

11. A bill is addressed to "J. B., general agent of the X Company". He accepts it thus: "Accepted on behalf of the company.—J. B." J. B. is personally liable as acceptor.¹³

12. A bill is addressed to the Saltash Steam Packet Co., the proper name of the company being the Saltash Steam Packet Co., Ltd. It is accepted by "J. M., Secretary to the Company". This is not the acceptance of the company, but, by virtue of sections 42 and 47 of the Companies Act, 1862, J. M. is personally liable.¹⁴

13. Instrument in the form of a bill which is addressed to no one. B writes an acceptance on it. B may be liable as the maker of a note, but not as an acceptor.¹⁵

14. A firm of "Cormack Brothers" dissolved partnership, and Carter, an agent, was appointed to wind it up. M. Cormack had been a partner in the firm. Carter accepted, for his own purposes, a bill drawn on "Cormack Brothers", signing the acceptance "M. Cormack and R. Carter". Held, that M. Cormack was not liable on this acceptance.¹⁶

15. A bill is addressed to "X & Co." The proper style of the firm is "B X & Co.", and it is accepted in that style. This is a valid acceptance.¹⁷

Compare s. 17 (1) with the language of the Indian Contract Act, 1872, s. 2 (b), namely, "When the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted. A proposal, when accepted, becomes a promise".

After the drawee has accepted a bill he is thenceforth termed the "acceptor". By s. 2, unless the context requires, "acceptance" means an acceptance completed by delivery or notification. As to such delivery or notification, see s. 21.

Subject to the provisions of the Act as to acceptance for honour (ss. 65—68), and to the special case provided for by s. 98 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 28), p. 860, it is clear law, both in England and Scotland, that no person other than the drawee can be liable as acceptor of a bill.¹⁸

Illustrations 6 and 7 show that when a bill is addressed to two or

¹¹ *Lindus v. Bradwell* (1848), 5 C. B. 588; 136 E. R.; but see p. 42.

¹² *Okell v. Charles* (1876), 34 L. T. (N.S.) 822, C. A.; *Stacey & Co. v. Wallis* (1912), 28 T. L. R. 209.

¹³ *Herald v. Connah* (1876), 34 L. T. (N.S.) 885; *Mare v. Charles* (1856), 5 E. & B. 978; 119 E. R. See contra an American case, *Laffin v. Sinsheimer* (1877), 30 Amer. R. 472.

¹⁴ *Penrose v. Martyr* (1858), E. B. & E. 409; 120 E. R., decided on 19 & 20 Vict. c. 47; and *Atkins v. Wardle* (1889), 58 L. J. Q. B. 377. See now s. 93 of the Companies Act, 1929.

¹⁵ *Fielder v. Marshall* (1861), 30 L. J. C. P. 158; *Mason v. Lach* (1929), 140 L. T. 896; *Haseldine v. Winstanley*, [1986] 2 K. B. 101.

¹⁶ *Odell v. Cormack* (1887), 19 Q. B. D. 228.

¹⁷ *Lloyd v. Ashby* (1881), 2 B. & Ad. 28; 109 E. R. Note that headnote to *Kirk v. Burton* (1841), 9 M. & W. 284; 152 E. R., is incorrect, the action being against the drawer, not the acceptor.

¹⁸ *Steele v. M'Kinlay* (1880), 5 App. Cas. 754, and cases *supra*.

more persons, whether partners or not, any one may accept so as to bind himself.

Illustrations 7 and 8 exemplify the rule of English law, that a firm name or signature is merely a compendious form of expressing the names or signatures of all the partners in that firm.

Illustrations 9 to 11 show that in construing an acceptance the address, or order, to the drawee and the acceptance should be read together *ut res magis valeat*.¹⁹ An agent who signs a bill for his principal without authority, though not liable on the instrument, may be liable to the holder in an action for falsely representing that he had authority, or for breach of his implied warranty of authority.²⁰

It is to be noted that *Lindus v. Bradwell* (Illustration 9) was decided before the Acts which required an acceptance to be signed by the acceptor²¹; the Court seems to rest its decision on the ground that, though a bill must be accepted by the drawee, he may accept in any name he chooses to adopt, and that, in this case, William B. chose to adopt *pro hac vice* the name of his wife to accept in.²² The case was decided at a time when a married woman was incapable, at common law, of contracting otherwise than as agent: her signature in those days was valueless to an engagement unless she expressly bound her separate estate (and she possessed such property).

In *Mason v. Rumsey*, a bill was addressed to a firm. One of the partners accepted it in his own name, and it was held that the firm was liable on this acceptance.²³ But this case was decided before the 19 & 20 Vict. c. 97, s. 6, which required an acceptance to be signed by the drawee, and is presumably no longer law. It is clear that the partner who signed would be liable.²⁴

Requisites in form.

(2) An acceptance is invalid unless it complies with the following conditions, namely:—

- (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

¹⁹ Cf. *Alexander v. Sizer* (1869), L. R. 4 Ex. at p. 105.

²⁰ *Polhill v. Walter* (1832), 3 B. & Ad. 114; 110 E. R.; *West London Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; *Collen v. Wright* (1857), 7 E. & B. 301; *Starkey v. Bank of England*, [1908] A. C. 114.

²¹ See 19 & 20 Vict. c. 97, s. 6, now repealed and reproduced in this section.

²² *Lindus v. Bradwell* (1848), 5 C. B. at p. 591; 136 E. R., *per* Maule, J.

²³ *Mason v. Rumsey* (1808), 1 Camp. 384; 170 E. R. See *contra* an American case, *Cunningham v. Smithson* (1841), 12 Leigh. 82.

²⁴ *Queen v. Von Uster* (1850), 10 C. B. 318; 138 E. R.

- (b) It must not express that the drawee will perform his promise by any other means than the payment of money.²⁵

ILLUSTRATIONS

1. A draws a bill on B. B writes thereon the word "Accepted", but does not sign it. This is not an acceptance.

2. A draws a bill on B. B writes a letter to A promising to pay the bill, and shows the letter to the holder. This is not an acceptance.

3. The drawee of a bill writes an acceptance on the back of it. This is (probably) sufficient.²⁶

4. A bill is drawn on B for £100. B accepts it, "payable in bills" or "payable in goods". This is invalid.²⁷

5. A bill is left with B for acceptance. He does not accept it, but retains it for a long time and ultimately destroys it. B is not liable as acceptor, the holder's remedy is by action for the conversion of the bill.²⁸

A drawee may sign by hand of his agent (s. 61). As to the acceptance of a bill in a set, see s. 71 (4). The first part of clause (a) reproduces the effect of the repealed 19 & 20 Vict. c. 97, s. 6, which provided that the acceptance of a bill, whether inland or foreign, must be written on the bill itself and signed by or on behalf of the acceptor. The second part of the clause reproduces the effect of the repealed 41 & 42 Vict. c. 18, which provided that the mere signature of the drawee on the bill should be a sufficient acceptance; this Act overrode *Hindhaugh v. Blakey*, where such an acceptance had been held insufficient.²⁹

The usual mode of accepting is for the drawee to write "accepted" across the face of the bill, and then to sign his name underneath; but the drawee may use any form of words from which the intention to accept can be gathered. Some of the continental codes (e.g., the Spanish Code) require the precise term "accepted" to be used.

As to cancellation of acceptance, see s. 21 (1).

At common law a verbal acceptance was valid,³⁰ and New York Negotiable Instruments Law, §§ 222, 233, makes an unconditional

²⁵ Cf. New York Negotiable Instruments Law, §§ 220, 221.

²⁶ *Young v. Glover* (1857), 3 Jur. (n.s.) 637, per Lord Campbell. Spanish bills are sometimes accepted on the back. New York Negotiable Instruments Law, § 221, requires the acceptance to be on the face of the bill.

²⁷ *Russell v. Phillips* (1850), 14 Q. B. 891; 117 E. R.; cf. *Boehn v. Garcias* (1807), 1 Camp. 425, n.; 170 E. R.; and see s. 3 (2). When the time of payment comes, the holder may, of course, accept goods or bills in satisfaction of the debt due to him. Cf. s. 19 (2) (b). But see § 223 of the New York Negotiable Instruments Law.

²⁸ *Jeune v. Ward* (1818), 1 B. & Ald. 653, at p. 660; 106 E. R. But note s. 53, under which a bill may operate in Scotland as an assignment of funds in hands of drawee.

²⁹ *Hindhaugh v. Blakey* (1878), 3 C. P. D. 136; cf. *Steele v. M'Kinlay* (1890), 5 App. Cas., at pp. 782, 785.

³⁰ *Bank of Ireland v. Archer* (1848), 11 M. & W. 383; 152 E. R. It was even held that the undue mention of a bill by the drawee might amount to an acceptance: see *Harvey v. Martin* (1808), 1 Camp. 425, n.; 170 E. R. See *Billing v. Devaux* (1841), 3 M. & Gr. 565; 138 E. R., as to an acceptance by letter.

promise in writing to accept equivalent to acceptance, if the bill be taken on the faith of it.

Time for acceptance.

18. A bill may be accepted—

- (1) Before it has been signed by the drawer, or while otherwise incomplete.³¹
- (2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment.

Date of acceptance, after previous dishonour.

- (3) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

ILLUSTRATIONS

1. A draws a bill on B, dated January 1, payable one month after date. The holder presents it for acceptance in March. B accepts. As regards B this is a valid acceptance of a bill payable on demand.³²

2. The holder of a bill payable one month after sight presents it to the drawee for acceptance. Acceptance is refused. A week after it is re-presented and accepted. The acceptance is valid.³³

Sub-s. (3) was added in committee. It accords with mercantile practice, and was intended to secure that, apart from special agreement, the holder should be put, as far as possible, in the same position as if the bill had not been dishonoured before its ultimate acceptance. It has been adopted by § 226 of the New York Negotiable Instruments Law.

Presumption as to time.—Unless the contrary appear by its terms, a bill of exchange is *prima facie* deemed to have been accepted before maturity and within a reasonable time after its issue, but there is no presumption as to the exact time of acceptance.³⁴ For example, B accepts, without dating, a bill drawn payable three months after date. He attains his majority the day before the bill matures. This

³¹ See s. 20; *London and South Western Bank v. Wentworth* (1880), 5 Ex. D. 96. Cf. *Mason v. Lack* (1929), 45 T. L. R. 868, where this section was not relied on, but the failure to indicate the drawee by name or otherwise was never corrected: see p. 19, Illustration 1.

³² *Mutford v. Walcot* (1698), 1 Ld. Raym. 574; 91 E. R., and now so enacted by s. 10 (2).

³³ *Wynne v. Raikes* (1804), 5 East 514; 102 E. R.

is *prima facie* evidence that B accepted it while an infant³⁴; but, having regard to s. 18 (2), ought a mere presumption of no necessary cogency to destroy the validity of an otherwise enforceable acceptance? Surely the onus is on B to prove that he accepted it under age?

General and qualified acceptances.

19. (1) An acceptance is (a) general or (b) qualified.

Qualified acceptances.

(2) A general acceptance assents without qualification to the order of the drawee. A qualified acceptance in express terms varies the effect of the bill as drawn.³⁵

In particular an acceptance is qualified which is—

Conditional.

(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated:

ILLUSTRATIONS

1. The drawee of a bill accepts it, "Accepted—payable on giving up bills of lading for clover per ship *Amazon*".³⁶
2. Or he accepts it, "Accepted—payable when in funds".³⁷
3. A draws a bill on B, payable to himself or order. B, when accepting it, writes over his acceptance the words "in favour of A only", and the words "or order" are struck out. This is not a qualified acceptance, and the negotiability of the bill is not restricted.³⁸

Partial.

(b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:

ILLUSTRATIONS

1. Bill drawn on B for £100. B accepts it as to £50.³⁹
2. Bill drawn on B for £100. B accepts it, payable half in money, half in goods. This is valid as a qualified acceptance for £50.⁴⁰

³⁴ *Roberts v. Bethell* (1862), 12 C. B. 778; 188 E. R.

³⁵ New York Negotiable Instruments Law, § 227, and cases cited in Crawford's edition.

³⁶ *Smith v. Vertue* (1860), 30 L. J. C. P. 56. Cf. *Smith v. Scarffe* (1741), 7 Mod. Rep. 426 (acceptance to pay "when [certain goods] are sold").

³⁷ *Ibid.*, and *Julian v. Shobrooke* (1758), 2 Wils. 9; 95 E. R.

³⁸ *Decroix v. Meyer*, [1891] A. C. 520, H. L. By reason of the position and collocation of the words written by the acceptor they might be taken as a mere memorandum; *aliter*, if they had run "accepted in favour of A only". Cf. *Hibernian Bank v. Gysin and Hanson*, [1889] 1 K. B. 488.

³⁹ Cf. *Wegsloff v. Keene* (1709), 1 Stra. 214; 93 E. R.; and see s. 44 (2).

⁴⁰ *Petit v. Benson* (1897), Comberb. 452; cf. *Rowe v. Young* (1820), 2 Bligh, H. L. at p. 409; 2 B. & B. 165; 129 E. R.

Particular place only.

(c) local, that is to say, an acceptance to pay only at a particular specified place :

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere ⁴¹ :

ILLUSTRATIONS

1. The drawee of a bill accepts it "payable at Messrs Smith & Co", his bankers. This is a general acceptance.⁴²

2. The drawee of a bill accepts it "payable at the Union Bank and not elsewhere", or "payable only at the Union Bank". This is a qualified acceptance.⁴³

3. Bill accepted in London, payable at the X Bank, Kandy, in Ceylon, and dishonoured. This is a general acceptance, and the acceptor may be sued in England.⁴⁴

4. Bills drawn payable at a bank in Amsterdam are accepted by the drawees in London. This is a general acceptance, and the fact that the bill is payable in Dutch currency does not displace the application of s. 19 (2) (c).⁴⁵

Time.

(d) qualified as to time ⁴⁶ :

ILLUSTRATIONS

1. A draws a bill on B, payable two months after date. B accepts it, payable six months after date.⁴⁷

2. B accepts a bill drawn on him, "on condition that it be renewed", for six months.⁴⁸

Some of several drawees.

(e) the acceptance of some one or more of the drawees, but not of all.

ILLUSTRATION

Bill drawn on B, X, and Y. B accepts. X and Y refuse to accept. This is a qualified acceptance.⁴⁹

The holder may refuse to take a qualified acceptance (s. 44). If he does, he must give notice to the drawer and indorsers, who (except in the case of a partial acceptance ⁵⁰) may decline to be bound by it.

⁴¹ Cf. New York Negotiable Instruments Law, § 228, and notes in Crawford's edition.

⁴² Cf. *Halstead v. Skelton* (1843), 5 Q. B. 86, Ex. Ch ; 114 E. R.

⁴³ *Ibid*.

⁴⁴ *Ex p. Hayward* (1887), 3 T. L. R. 687.

⁴⁵ *Bank Polski (Banku Polskiego) v. K. J. Mulder (Mulder) & Co.*, [1941] 2 A. E. R. 647; [1942] 1 A. E. R. 306, C. A.

⁴⁶ The validity of such an acceptance must of course be subject to the provisions of the Stamp Acts.

⁴⁷ *Russell v. Phillips* (1850), 14 Q. B. 891; cf. *Fanshawe v. Peet* (1857), 26 L. J. Ex. 314; 117 E. R.

⁴⁸ *Ibid*.

⁴⁹ *Marius*, No. 16; New York Draft Code, § 1784; Nonguier, § 451.

⁵⁰ In the case of a partial acceptance the holder's rights are reduced in amount by the sum for which the bill was accepted, until the bill is dishonoured by a failure to pay the partial acceptance. S. 44 (2).

The continental codes admit a partial acceptance, but make any other condition equivalent to a refusal to accept.⁵¹ As to the effect of this conflict of laws, see s. 72. An acceptance is, whenever possible, to be construed as general, not qualified; and a mere memorandum, such as a wrong due date, inconsistent with such construction, has been rejected as being no part of the acceptance.⁵² Whether acceptance is general or qualified is a question of law.⁵³

In an action by holder against acceptor, Byles, J., said: "The simple meaning of an acceptance is 'I will pay'. So translating the word 'accepted', what is meant by saying 'accepted payable on giving up bill of lading'? It is impossible, I think, to contend that this is not a conditional acceptance. Then it is said that this being a conditional acceptance, the bill of lading must be handed over to the acceptor on the day when the bill falls due [and if not, that the acceptor is discharged]. Now, it seems to me that this is not so, but that the qualification merely qualifies the acceptor's obligation throughout the whole extent of that obligation; and that, as between the holder and the acceptor, that obligation exists for six years at all events".⁵⁴ See further s. 52 (2). As to securities for bills, see p. 801.

As to partial acceptances, see further s. 44 (2).

Sub-s. (2) (c) reproduces the effect of the repealed 1 & 2 Geo. 4, c. 78, which was passed to override the case of *Rowe v. Young*, where it had been held that an ordinary acceptance payable at a banker's was a qualified acceptance.⁵⁵ See further ss. 44, 45 (4), and 52 (2).

The particular cases specified in sub-s. (2) do not profess to be exhaustive. Where a bill was drawn payable "in effective and not in vals reals" (i.e., coin as distinguished from paper) an acceptance payable in "denaros" was held to be qualified.⁵⁶

The continental codes admit partial, but prohibit conditional, acceptances.

This section does not apply to notes: see ss. 87 and 89.

Inchoate instruments or blank signatures.

20. (1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be

⁵¹ See German Exchange Law, Art. 22; French Code, Art. 124, Netherlands Code, Art. 120.

⁵² *Fanshawe v. Peet* (1857), 26 L. J. Ex. 314; cf. *Stone v. Metcalfe* (1815), 4 Camp. 217; 171 E. R.; *Pitch v. Jones* (1855), 5 E. & B. at p. 246, 119 E. R.; *Decroix v. Meyer*, [1891] A. C. 620, H. L.

⁵³ *Sproat v. Matthews* (1786), 1 T. R. 182; 99 E. R.

⁵⁴ *Smith v. Vertue* (1880), 30 L. J. C. P. at p. 60.

⁵⁵ *Rowe v. Young* (1820), 2 Blyth, H. L. 391; 2 B. & B. 165; 4 E. R. The whole question of qualified acceptances is here discussed at length.

⁵⁶ *Boehm v. Garcias* (1808), 1 Camp. 425, n.; 170 E. R.

converted into a bill,⁵⁷ it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover,⁵⁸ using the signature for that of the drawer,⁵⁹ or the acceptor,⁶⁰ or an indorser⁶¹; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.⁶²

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time,⁶³ and strictly in accordance with the authority given.⁶⁴ Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.⁶⁵

ILLUSTRATIONS

1. Bill drawn payable to — or order. Any holder for value may write his own name in the blank, and sue on the bill.⁶⁶

2. B, who is indebted to C, gives him a blank acceptance for £100. C dies. If C's administrator fills up the paper as a bill payable to drawer's order, and inserts his own name as drawer, he can enforce payment thereof against the acceptor.⁶⁷

⁵⁷ *Barendale v. Bennett* (1878), 3 Q. B. D. at p. 581, C. A.; *Smith v. Prosser*, [1907] 2 K. B. at p. 753, C. A.

⁵⁸ *Swan v. N. B. Australasian Co.* (1868), 2 H. & C. at p. 184; 150 E. R.; 32 L. J. Ex. 278.

⁵⁹ *Collis v. Emmet* (1790), 1 H. Bl. 313; 126 E. R.

⁶⁰ *Molloy v. Delves* (1881), 7 Bing. 428; 181 E. R.

⁶¹ *Foster v. Mackinnon* (1869), L. R. 4 C. P. at p. 712; *Glenie v. Bruce-Smith*, [1908] 1 K. B. 268, C. A.; as explained, *Shaw v. Holland and Neal*, [1913] 2 K. B. 15, C. A. Cf. *Russell v. Langstaffe* (1780), 2 Dougl. 514, 516; 99 E. R.; "the indorsement on a blank note is a letter of credit for an indefinite sum", *per* Lord Mansfield. And see *National Sales Corporation v. Bernardi* (1931), 47 T. L. R. 880, and *McCall Bros., Ltd. v. Hargreaves*, [1932] 2 K. B. 428.

⁶² *Crutchley v. Mann* (1814), 5 Taunt. 529; 128 E. R.; and cases, *supra*; cf. New York Negotiable Instruments Law, § 88.

⁶³ *Temple v. Pullen* (1858), 8 Exch. 880; 155 E. R.; *Montague v. Perkins* (1858), 22 L. J. C. P. 187.

⁶⁴ *Aude v. Dixon* (1851), 6 Exch. 869; *Hanbury v. Lovett* (1868), 18 L. T. (N.S.) 866; *Oakley v. Boulton* (1888), 5 T. L. R. 80, C. A.

⁶⁵ *Schultz v. Asley* (1896), 2 Bing. N. C. 544; *Foster v. Mackinnon* (1869), L. R. 4 C. P. at p. 712; *Guildford Trust, Ltd. v. Goss and Another* (1927), 43 T. L. R. 167; cf. New York Negotiable Instruments Law, § 88; and cases cited in *Crawford's* edition.

⁶⁶ *Crutchley v. Mann* (1814), 5 Taunt. 529; 128 E. R. Cf. Illustration 14.

⁶⁷ *Scard v. Jackson* (1875), 34 L. T. (N.S.) 65.

8. B, who is indebted to C, gives him a blank acceptance for £100, and then dies. C may fill in his own name as drawer and payee after B's death, and recover the amount from B's estate.⁶⁸

1. B, having authority to do so, gives a blank acceptance for £100 in the name of his firm. It is filled up after B's death. The surviving partners are liable.⁶⁹

5. B gives C a blank acceptance to accommodate him, and without receiving value. After B's death it is filled up and discounted with D, who sees it filled up. D cannot recover the amount from B's estate.⁷⁰

6. B gives a blank acceptance to a money-lender, who fills it up as a bill payable to drawer's order, inserting a fictitious signature as that of drawer and indorser. If the bill afterwards gets into the hands of a holder in due course he can recover from B.⁷¹

7. B puts a blank acceptance of his own in his desk. It is stolen, and then filled up as a bill. Even a holder in due course cannot recover from B, for B never delivered the inchoate instrument for the purpose of conversion into a bill.⁷²

8. B gives a blank acceptance in the name of his firm to C without the authority of his co-partners. C gives the bill in this state to his own partner for a private debt, who then fills in the name of C's firm as drawer and payee. C's firm cannot recover on this bill from B's firm.⁷³

9. B and X sign as makers a joint and several note, with blanks for date and payee's name. B signs on condition that the note shall only be issued if Y also will join as a maker. Y refuses to join. X, who is in possession of the note, represents to plaintiff that he has authority to issue it. He fills in plaintiff's name as payee, and transfers the note to him for value. Plaintiff cannot recover from B.⁷⁴

10. B signs as acceptor a bill on a 6d. stamp, with the amount left blank. In the margin is £4. This is fraudulently altered to £40, and the bill is filled up for forty pounds. A holder in due course can recover £40 from B.⁷⁵

11. B, a bankrupt, gives a blank acceptance. It is filled up and negotiated after his discharge. The holder can recover, for there was no provable debt until after B's discharge.⁷⁶

12. In 1840 B gives a blank acceptance on a 5s. stamp to A to accommodate him. In 1852 A fills up the document as a bill for £200 and signs as drawer. He then negotiates it to a holder in due course. The holder can recover from the acceptor.⁷⁷

13. An incomplete bill (no drawer's signature) which is sent by railway and lost, is not a security for the payment of money within the meaning of the Carriers' Act⁷⁸: *sed quære*. If it is not a security for the payment of money, what is it? Surely an instrument may be a security for money although not completed, particularly if it may be completed by anyone and become valid and effective in the hands of a holder in due course.

14. Document in the form of a bill payable to drawer's order, but not signed by the drawer, is accepted by B, and returned by him to the proposed drawer, who

⁶⁸ *Carter v. White* (1882), 20 Ch. D. 225; affirmed (1889), 25 Ch. D. 666, C. A., where it was held that a surety for the acceptor, not party to the bill, was not discharged.

⁶⁹ *Usher v. Daunocy* (1814), 4 Camp. 97; 171 E. R.

⁷⁰ *Hatch v. Searies* (1854), 2 Sm. & G. 147; 65 E. R.; 24 L. J. Ch. 22; approved *France v. Clark* (1884), 26 Ch. D. 267, at p. 262, C. A. Cf. Illustration 1 on p. 54.

⁷¹ *Schultz v. Astley* (1836), 2 Bing. N. C. 544; 183 E. R.; *London and South Western Bank v. Wentworth* (1880), 5 Ex. D. 96.

⁷² *Bawendale v. Bennett* (1878), 3 Q. B. D. 625, C. A. Cf. *Ingham v. Primrose*, Illustration 3, on p. 54.

⁷³ *Hogarth v. Latham* (1878), 3 Q. B. D. 643, C. A.

⁷⁴ *Awde v. Dixon* (1851), 6 Exch. 869; 155 E. R.

⁷⁵ *Garrard v. Lewis* (1882), 10 Q. B. D. 80.

⁷⁶ *Goldsmid v. Hampton* (1858), 5 C. B. (n.s.) 94; 27 L. J. C. P. 286; 141 E. R.; cf. *Ex p. Hayward* (1871), L. R. 6 Ch. 546. Such a transaction presumably would in most, if not all, cases, constitute a fraud on the bankruptcy laws.

⁷⁷ *Montague v. Perkins* (1853), 22 L. J. C. P. 187.

⁷⁸ *Stoessiger v. S. E. Ry.* (1854), 3 E. & B. 540; 113 E. R.; but such an instrument, if in the hands of the drawer, might be a security for money within the Larceny Acts; *R. v. Bowerman*, [1891] 1 Q. B. 112.

dies before signing it. The drawer's executors cannot sue B on this instrument, but it may be evidence of a debt from B to the drawer's estate.⁷⁹

15. A drawer in Bavaria signs a bill with the amount and date left in blank. His agent in England fills up the blanks, and in fraud of the drawer indorses it away for a private debt. A holder in due course can recover on it, and it is not material that the bill bears only a foreign bill stamp.⁸⁰

16. B, intending to borrow £15 from X, signs a blank stamped paper, and authorises X to fill it up as a note for £15 payable to X. X, instead of so doing, fills up the document as a promissory note for £30 payable to C, and then hands it to C, who takes it in good faith and for value. This is not a negotiation of the note to a holder in due course, and C cannot recover.⁸¹

17. B signs, as maker, a blank stamped paper, and gives it to X, authorising him to fill it up as a note for £250, to secure an advance which C is to make to X. X fraudulently fills it up as a note for £1,000 payable to C, who has in good faith advanced £1,000. B is estopped from setting up X's fraud, and C is entitled to recover the £1,000 from B.⁸² *Sed quære*.

18. B, in South Africa, signs his name on a blank unstamped paper, on which is a lithographed form of a promissory note, and hands it to T, his agent, to be retained until further instructions. T fraudulently fills up the blanks and negotiates the note to C, who in good faith gives full value to T. The instrument is stamped in England as a foreign note, and the maker is sued thereon by C. He is not liable, for he did not deliver the document for the purpose of being filled up and negotiated.⁸³

19. B, the acceptor of a bill, is asked to renew it. He accordingly signs his name on the back of a blank stamped bill form. This is an authority to fill it up as a bill making B liable as an indorser, not as acceptor.⁸⁴

20. A draws a cheque to bearer, filling up the space for figures with £2, but leaving in blank the space for showing the amount in words. A confidential clerk fills in the space for words "one hundred and twenty pounds", and alters the £2 into £120. If the clerk misappropriates the cheque and gets it cashed, the bank can debit A's account with £120.⁸⁵

21. A sells goods to B and draws a bill on him payable to his own order, but does not indorse it. B accepts the bill, C indorses it to guarantee the acceptor, and then hands it back to A, the drawer. If the bill is dishonoured the drawer can complete the bill by making it payable to himself and then recover from the indorser.⁸⁶

22. A blank cheque crossed "not negotiable" was signed and delivered to a servant to fill in for the amount of £2 in favour of X. The servant fraudulently filled in the amount of £54 in favour of Y. Held that Y must refund the sum of £54 collected by Y's banker as the instrument was not negotiable, and that Y as payee was a person within the meaning of s. 81. The principle in *Lloyd's Bank v. Cooke* was not to be extended.^{87a}

⁷⁹ *Lawson's Errors v. Watson* (1907), 9 F. 1353 (Scotland). *Qu.* if executors could complete by signing as drawers.

⁸⁰ Cf. *Barker v. Sterne* (1854), 9 Exch. 684; 156 E. R.

⁸¹ *Herdman v. Wheeler*, [1902] 1 K. B. 361; *Jones v. Waring and Gillow*, [1926] A. C. 670, *supra*, p. 93, and s. 20.

⁸² *Lloyds Bank v. Cooke*, [1907] 1 K. B. 794, C. A. If this decision is supportable only on the assumption that C is a holder in due course, it would appear to be overruled by *Jones v. Waring and Gillow*, *supra*. Cf. *Ayres v. Moore*, [1939] 4 A. E. R. 361, where neither *Herdman v. Wheeler* nor *Lloyds Bank v. Cooke* were referred to. See illustration 22 and *Wilson*, *etc. v. Pickering*, note (86a).

⁸³ *Smith v. Prosser*, [1907] 2 K. B. 735, C. A. Distinguished, *Guildford Trust, Ltd. v. Goss and another* (1927), 43 T. L. R. 167.

⁸⁴ *Belfast Banking Co. v. Keown* (1898), 33 Ir. L. T. 95, Falles, C.B.

⁸⁵ *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777, H. L.

⁸⁶ *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 625, H. L.; distinguishing *Steele v. McKinlay* (1880), 5 App. Cas. 754, H. L. Applied in *National Sales Corporation v. Bernardi* (1931), 47 T. L. R. 880, where held that the position of the drawer's signature when indorsing is immaterial; this latter case was followed by *Goddard, J., in McCall Bros., Ltd. v. Hargreaves*, [1932] 2 K. B. 423.

^{87a} *Wilson and Meeson v. Pickering*, [1946] 1 A. E. R. 894.

This section is supplemented by s. 12, which provides for the special case of a bill payable after date, or an acceptance payable after sight being issued undated. See "holder" defined by s. 2, and "holder in due course" by s. 29, and note that it enters into the latter definition that the bill is "complete and regular on the face of it"; if not, *caveat emptor*. In Illustrations 5, 8, and 9 the holder was not a holder in due course.

In *Hatch v. Searles*,⁸⁷ Vice-Chancellor Stuart says: "As to a *bona fide* holder the question as to the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance, unless he can be fastened with notice of that imperfection. If the holder has notice of the imperfection he can be in no better situation than the person who took it in blank, as to any right against the acceptor or indorser who gave it in blank. But if he [is to] be a *bona fide* holder without notice, he must have taken the negotiable instrument in a perfect shape and in terms a complete contract."

An instrument wanting in some one or more requisites of a complete bill is in effect a transferable authority to create a bill. While incomplete it is subject to the ordinary rules of law relating to authorities, e.g., an authority coupled with an interest is not revoked by the death of donor or donee, while an authority not coupled with an interest is revoked by the donor's death; see Illustrations 2 to 5. The liabilities of the parties accrue from the time when the instrument is issued in a complete form, and not from the time when their signatures are attached.⁸⁸

The section refers only to blank signatures, etc., on stamped paper. Incomplete instruments on unstamped paper are outside the section, and are governed by the ordinary common law rules as to estoppel (see, e.g., Illustration 18). As to forgery of inchoate instruments, see s. 1 (8) of the Forgery Act, 1918 (3 & 4 Geo. 5, c. 27).

The New York Negotiable Instruments Law, § 84, in order to give effect to the principle of such cases as *Baxendale v. Bennett* (Illustration 7), enacts that "where a negotiable instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery".

Delivery to complete contract.

21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and

⁸⁷ (1854), 2 Sm. & G. 147; 65 E. R.; approved *France v. Clark* (1884), 26 Ch. D. 257, at p. 262, C. A.

⁸⁸ *Montague v. Perkins* (1868), 22 L. J. C. P. 187 (Statute of Limitations); *Ex p. Hayward* (1871), L. R. 6 Ch. 546 (petitioning creditor's debt).

revocable, until delivery of the instrument in order to give effect thereto.

Delivery.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.⁹⁰

ILLUSTRATIONS

1. B, who owes C £100, makes a note for the amount payable to C. B dies, and the note is afterwards found among his papers. C has no right to this note, and if it be given to him he cannot enforce it.⁹¹

2. B makes a note in favour of his servant, and hands it to his solicitor, telling the solicitor to retain the note till his death, and then hand it to the servant, if still in his service. B dies, and the solicitor hands the note to the servant. The servant can (perhaps) prove for the amount in the administration of B's estate.⁹¹

3. B makes a note in favour of C, and delivers it to a stakeholder (*e.g.*, trustee under composition deed). C thereby acquires no property in the note.⁹²

4. C, the holder of a bill, specially indorses it to D, and transmits it by post to X, his own agent. X informs D that he has received the bill, but does not give it him or undertake to hold it on his account. C (probably) can revoke the transaction and cancel his indorsement to D.⁹³

5. C, the holder of a bill, specially indorses it to D, and places it in an envelope to D. The envelope with a letter and the bill enclosed, which is put in the C's office posting-box, is stolen by C's clerk who forges D's indorsement and negotiates the bill. The property in the bill remains in C.⁹⁴

6. By the regulations of the English Post Office, a letter once posted cannot be reclaimed. If, then, the indorsee of a bill authorise the indorser to transmit it to him by post, the property in the bill passes to the indorsee, and the indorsement becomes complete as soon as the letter which contains the bill is posted.⁹⁵

⁹⁰ *Cox v. Troy* (1822), 5 B. & Ald. 474; 106 E. R.; Nougier, § 551. The drawee, unlike the drawer or indorser, has no property in the bill, therefore less is required to make him attorn to the holder. By German Exchange Law, Art. 21, an acceptance once written cannot be cancelled.

⁹¹ *Cf. Bromage v. Lloyd* (1847), 1 Exch. 32; 154 E. R.

⁹² So held in *Re Richards* (1887), 36 Ch. D. 541, but criticised in *Re Whitaker* (1889), 42 Ch. D. 119, at p. 125, C. A. It would seem to be an attempt to make a testamentary bequest outside the will or codicils thereto; that does not affect the point that there may have been a good delivery within s. 21 (1).

⁹³ *Cf. Latter v. White* (1872), L. R. 5 H. L. 578.

⁹⁴ *Brind v. Hampshire* (1886), 1 M. & W. 865; 150 E. R.; *Muller v. Pondir* (1878), 55 New York R. 325.

⁹⁵ *Cf. Arnold v. Cheque Bank* (1876), 1 C. P. D. at p. 584.

⁹⁶ *Ex p. Cote* (1873), L. R. 9 Ch. 27; *Sichel v. Borch* (1864), 2 H. & C. 954; 38 L. J. Ex. 179; 159 E. R.; *Kleinwort v. Comptoir D'Escompte*, [1894] 2 Q. B. at p. 168 (crossed cheque sent by post from Barcelona to England and stolen in transit). The proposition underlying the Illustration appears to be equally sound although the indorsee did not authorise transmission through the post; difficulties only arise if the letter with its enclosure goes astray. But if there be no authority, express or implied, to send by post, the instrument is so sent at sender's risk; *Pennington v. Crossley* (1887), 18 T. L. R. 518, C. A. As to the usual practice to remit money by crossed cheque, and not by posting bank notes, see *Mitchell-Henry v. Norwich Union* (1917), 84 T. L. R. 77. See *Ose Gesellschaft v. Jewish Colonial Trust* (1927), 48 T. L. R. 898 (money remitted abroad by cheque in a registered letter held to be at the risk of the customer who requested the bank to remit; although there was no express authorisation of that method of transmission).

7. The holder of a note payable to bearer wishes to remit money to D. For safety of transmission he cuts the note in half and posts one half to D. Before he posts the second half he changes his mind, and writes to D demanding back the half he has sent. He is entitled to do so, for a partial delivery is ineffectual.⁹⁶ *Sed quæritur*. The position to the present editor seems that although no rights under the whole instrument have passed to D so that the holder could sue on the half he has retained, yet he has no right to the return of the half as a piece of paper.⁹⁷

8. A bill is left with the drawee for acceptance. The drawee writes an acceptance on it. The next day the holder calls for the bill; he is merely informed that it is mislaid, and is requested to call the next day. In the meantime the drawee hears that the drawer has failed. He accordingly cancels his acceptance, and the next day delivers the dishonoured bill back to the holder. This is no acceptance; the drawee was entitled to cancel it.⁹⁸

9. A firm is indebted to D. X, who is a partner in the firm, and also agent for D, writes the firm's indorsement on a bill held by the firm, and puts the bill with some other papers of D's of which he has the custody. This is delivery and so a valid indorsement by the firm, and the property in the bill passes to D.⁹⁹

10. In reply to a letter requesting "the favour of a cheque" in payment of a debt, the debtor sends by post to his creditor a cheque for the amount. The cheque is stolen in the post, and the thief gets it cashed. The posting is a good delivery to the payee, and the cheque operates as payment.¹

Post Office.—By s. 2, "delivery" means transfer of possession, actual or constructive, from one person to another. "To constitute a contract", says Bovill, C.J., "there must be a delivery over of the instrument by the drawer or indorser for a good consideration, and as soon as these circumstances take place the contract is complete, and it becomes a contract in writing."² "In order to make the property in bills pass," says Mellish, L.J., "it is not sufficient to indorse them. They must be delivered to the indorsee or to the agent of the indorsee. If the indorser delivers them to his own agent, he can recover them; if to the agent of the indorsee, he cannot recover them".³

Illustrations 6 and 10 show that the Post Office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the Post Office is the agent of the sender.⁴

By whom.

(2) As between immediate parties, and as regards a

⁹⁶ *Smith v. Mundy* (1860), 29 L. J. Q. B. 172; cf. *Redmayne v. Burton* (1860), 2 L. T. (N.S.) 824.

⁹⁷ Cf. *Rummens v. Hare* (1876), 1 Exch. D. 169.

⁹⁸ *Bank of van Diemen's Land v. Bank of Victoria* (1871), L. R. 3 C. P. 526.

⁹⁹ *Lysaght v. Bryant* (1860), 9 C. B. 46; 187 E. R.

¹ *Norman v. Ricketts* (1886), 3 T. L. R. 182, C. A.; *Thairlwall v. Great Northern Ry.*, [1910] 2 K. B. 509 (dividend warrant sent by post), but see p. 316. If the lost draft is not cashed the payee's remedy is under ss. 69 and 70.

² *Abrey v. Cruz* (1869), L. R. 5 C. P. at p. 42. See, too, *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

³ *Ex p. Cote* (1878), L. R. 9 Ch. 27, where the question was the effect of the French post office regulations.

⁴ *Baker v. Lipton* (1899), 15 T. L. R. 435 (part of allotment money returned through the post by cheque was lost; loss fell on the senders although the money was originally sent by the allottee through the post by cheque). *Luttges v. Sherwood* (1895), 11 T. L. R. 238 (acceptance sent through the post by acceptor to holder was lost in the post; loss fell on acceptor since the holder had not expressly authorised the acceptor to return the bill by post).

remote party other than a holder in due course,⁵ the delivery—

- (a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be⁶;

Conditional delivery.

- (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.⁷

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

Presumption as to delivery.

(8) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.⁸

ILLUSTRATIONS

1. The holder of a bill specially indorses it to D, and dies before delivering it, but his executor subsequently hands the bill to D. There is no valid indorsement, for an executor is not the agent of his testator to give a delivery from which his testator had abstained. D cannot sue on the bill.⁹

2. X, by means of a promise or condition which he does not fulfil, induces A to draw a cheque in favour of C. X delivers it to C, who receives it *bona fide* and for value. C acquires a good title, and can sue the drawer, for X is ostensibly the drawer's agent.¹⁰

3. A draws a cheque payable to bearer, intending to pay it to X. It is *stolen* from his desk before he issues it, and is subsequently negotiated to C, who takes it for value and without notice. C acquires a good title and can sue A.¹¹

⁵ See "holder in due course" defined by s. 29, and "delivery" by s. 2.

⁶ *Bromage v. Lloyd* (1847), 1 Exch. 92; 154 E. R.; cf. *Re Richards* (1887), 96 Ch. D. 511 (Illustration 2 on p. 52).

⁷ *Bell v. Lord Ingestre* (1848), 12 Q. B. at p. 319; cf. *Salmon v. Webb* (1852), 3 H. L. Cas. at p. 518; *Castrique v. Buttigieg* (1855), 10 Moore P. C. at p. 108; 68 E. R.; *Druff v. Parker* (1868), L. R. 5 Eq. at p. 197; *Benton v. Martin* (1878), 62 New York R. at p. 674.

⁸ Cf. New York Negotiable Instruments Law, § 85.

⁹ *Bromage v. Lloyd* (1847), 1 Exch. 92; 154 E. R. See this case distinguished, *Giddings v. Giddings* (1878), 31 Amer. R. 682. Cf. Illustration 5 on p. 49.

¹⁰ *Watson v. Russell* (1862), 3 B. & S. 94; 122 E. R.; 31 L. J. Q. B. 804; affirmed, 5 B. & S. 988, Ex. Ch.; criticised and distinguished, *Jones v. Waring & Gillow*, [1928] A. C. 870, H. L.; and cf. *Clutton v. Attenborough*, [1897] A. C. 90, H. L.; *Talbot v. Von Borris*, [1911] 1 K. B. 854, at p. 862, O. A.; but see *Herdman v. Wheeler*, [1902] 1 K. B. 561, as to the original payee of a promissory note.

¹¹ *Ingham v. Primrose* (1859), 7 C. B. (n.s.) at p. 85; 28 L. J. C. P. 284; *Kinyon v. Wahlford* (1872), 10 Amer. R. 165. The case seems conclusively this wise under the precise terms of the proviso of s. 21 (2). But see *Bawendale v. Bennett* (Illustration 7, p. 49) which was a case of an uncompleted and undelivered instrument and is therefore clearly distinguishable.

4. B makes a note payable to C, who sues him on it. B can defend himself by showing that the note was delivered to C on condition that it was only to operate if he should procure B to be restored to a certain office, and that B was not so restored.¹²

5. C, the holder of a bill, indorses it in blank and hands it to D on the express condition that D shall retire certain other bills forthwith. D does not do so. D cannot sue C, and if he sue the acceptor, the latter may set up the *jus tertii*.¹³

6. C, the holder of a bill, indorses it specially to D, in order that he may get it discounted for him. D, in breach of trust, negotiates the bill to E. If E take the bill *bona fide* and for value, he acquires a good title, and can sue all the parties thereto. If he do not so take it, he cannot sue C; and if he sue the acceptor, the latter may set up that the bill is C's¹⁴; further, C can bring an action against E to recover the bill or the proceeds.¹⁵

7. C, the payee of a bill, indorses it to D. D sues C as indorser. C may show that he and D were jointly interested in the bill, and that he indorsed to the latter to collect on joint account.¹⁶

8. B makes a note for £100 payable to C or order. C sues B. Evidence is admissible to show that the note was given as collateral security for a running account, and what the state of that account is.¹⁷

9. B makes a note in favour of C, and hands it to X, to deliver it to C, if he shall remain in B's service till B's death. After B's death, X hands the note to C. C (perhaps) may prove for the amount against B's estate.¹⁸

10. B, a partner in a firm, signs a blank cheque, and hands it to his manager D, intending that the rubber stamp of the partnership should be affixed and the cheque be used for partnership business. D fraudulently completes and negotiates the cheque as B's personal cheque, omitting to stamp it. The cheque is not delivered conditionally as an escrow but operatively; B is liable to a holder in due course.¹⁹

Conditional delivery.—"Holder in due course" is defined by s. 29. Where the person to whom a bill is delivered conditionally or for a special purpose misappropriates it, the true owner may sue that person or anyone else who takes it from him with notice of the facts for the conversion of the bill,²⁰ or if the bill has been collected the true

¹² *Jefferies v. Austin* (1725), 1 Stra. 674; 93 E. R.

¹³ *Bell v. Loid Ingestre* (1848), 12 Q. B. 317; cf. *Selgman v. Huth* (1877), 37 L. T. (N.S.) 488. Was there total failure of consideration? Presumably a withholding of the bill from currency for a short time would be sufficient to constitute a consideration, however inadequate, and the acceptor would have no answer, C being left to his remedy for breach of contract against D. Cf. *Adabel Hinnawi v. Yacoub Fakm, etc.*, [1936] 1 A. E. R. 698, with *Low v. Fry* (1935), 162 L. T. 585. But cf. further, *Lloyd v. Howard* (next illustration and note). It seems difficult to see how the property in the notes can shift back again to the indorser according to the conduct of the indorsee. The short answer to these objections may be that the acceptor can avail himself of the equities accruing in favour of the indorser.

¹⁴ *Lloyd v. Howard* (1850), 15 Q. B. 995; 139 E. R.; and cf. *Barber v. Richards* (1851), 6 Exch. 68; 155 E. R.

¹⁵ *Goggerley v. Cuthbert* (1806), 2 B. & P. N. R. 170; 127 E. R.; cf. *Alsager v. Glose* (1842), 10 M. & W. 576; 162 E. R.; *Muttyloll Seal v. Dent* (1853), 8 Moore P. C. 819; 14 E. R.

¹⁶ *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

¹⁷ Cf. *Ex p. Twogood* (1812), 19 Ves. 227; 34 E. R.; *Re Boys* (1870), L. R. 10 Eq. 467.

¹⁸ *Re Richards* (1887), 36 Ch. D. 541; but see comments in *Re Whitaker* (1889), 42 Ch. D. 119, 125, C. A.

¹⁹ *Guildford Trust, Ltd. v. Goss and another* (1927), 48 T. L. R. 167.

²⁰ *Goggerley v. Cuthbert* (1806), 2 B. & P. N. R. 170; 126 E. R.; *Alsager v. Glose* (1842), 10 M. & W. 576; 162 E. R.

owner may waive the tort and sue for the proceeds as money received to his use.²¹

Escrow.—A deed delivered conditionally is called an “escrow”, and by analogy the term is sometimes applied to bills. There is, however, this distinction: a deed cannot be delivered conditionally to the obligee; the delivery must be to a third party.²² Where a bill is delivered conditionally or for a special purpose, the relations between the person who so delivers it and the person to whom it is delivered are substantially those of principal and agent.²³ The person to whom it is delivered belongs, perhaps, to the class of agents called bailees²⁴; at least, if the terms “bailor” and “bailee” be used in the extensive sense given to them by Story in his work on Bailments.

By the term “immediate parties” is meant parties who are in direct relation with each other. Thus the drawer and the acceptor, the drawer and the payee, the indorser and the next indorsee are immediate parties.²⁵ But, as the Illustrations show, a remote party may, through absence of consideration, notice of fraud or other circumstances, stand on the same footing as an immediate party.

Contracts of parties to bill are contracts in writing.—A bill or note must be in writing, and so, too, must the supervening contracts thereon, such as acceptance or indorsement, and so the contracts of the various parties are subject to the ordinary rule as to written contracts.²⁶ Oral evidence is inadmissible in any way to contradict or vary their effect.²⁷ Evidence may be given for the purpose of establishing that there never was in law or fact an agreement, or that the agreement has been discharged, or to rebut these allegations. But, if the existence of the contract has to be conceded, then no evidence is admissible to vary its terms as expressed in or implied from the writing. But it is admissible (a) to show that what purports to be a complete contract has never come into operative existence²⁸; (b) to impeach the consideration for the contract²⁹; (c) to show that the contract has been discharged by payment, release

²¹ *Arnold v. Cheque Bank* (1876), 1 C. P. D. at p. 585. See *Muttyloll Seal v. Dent* (1853), 8 Moore P. C. 319; 14 E. R. As to the impropriety of the term “waive the tort”, and the extent of the principle so denominated, see *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 A. E. R. 20.

²² *Per Lord Denman*, in *Bell v. Lord Ingestre* (1848), 12 Q. B. at p. 319; 116 E. R.

²³ *Maguire v. Dodd* (1859), 9 Ir. Ch. 462.

²⁴ *Cf. Lloyd v. Howard* (1850), 15 Q. B. at p. 1000; 117 E. R., *Erle, J.: Manley v. Baycot* (1853), 2 E. & B. at p. 56; 118 E. R., *Lord Campbell*.

²⁵ *Cf. Indian Act*, s. 44, and *Jones v. Waring & Gillow*, [1926] A. C. 670, 680, *H. L.*, as to drawer and payee, criticising and distinguishing *Watson v. Russell* (1862), 9 E. & S. 34; 121 E. R.; *Ex. Ch.*

²⁶ *Foster v. Jolly* (1885), 1 C. M. & B. 708; 149 E. R.

²⁷ For the general principles see *Pollock's Contract*, 11th ed., p. 201.

²⁸ *S. 21 (2)*, and cases cited in illustration; also *Hitchings v. Northern Leather Co. of America* (1914), 20 Com. Cas. at p. 28.

²⁹ *Cf. Abrey v. Crux* (1869), L. R. 5 C. P. at p. 45.

or otherwise³⁰; (d) to show that the order of the signatures of the indorsers is not their order in time, *i.e.*, to show that a subsequent indorser signed above the signature of a prior indorser.³¹ Thus—

1. The mere signature of the holder on the back of a bill (indorsement in blank) is a contract in writing to this effect: 1. I hereby assign this bill to bearer. 2. I hereby undertake that if the bearer duly present this bill, and it is not honoured, I, on receiving due notice, will indemnify him.³²

2. A draws a bill in favour of C, and issues it to him for value. A thereby incurs the ordinary obligations of a drawer. If the bill be dishonoured and C sue A, oral evidence cannot be admitted to show that A's liability as drawer was conditional on the performance of certain acts by C, and that C has not performed them.³³

8. Bill drawn in ordinary form. Action by payee against acceptor. Evidence is not admissible to show that it was intended to be paid out of a particular fund which is no longer available.³⁴

4. Bill drawn conditionally. Evidence is not admissible to show that the condition has been performed, and that therefore the bill has ceased to be conditional and consequently it has become valid. A bill must be valid *ab initio*.³⁵

5. B makes a note payable to C one month after date. C sues B. Parol evidence is not admissible to show that it was intended to be payable two months after date.³⁶

6. Bill drawn and accepted in the ordinary form. Parol evidence is admissible to show that the holder knew that the bill was accepted for the accommodation of the drawer; also that he gave time to the drawer, thereby discharging the acceptor, whom he knew to be a mere surety.³⁷

7. Note payable fourteen days after date. Parol evidence is not admissible to show that the note was not to be enforced if a verdict was obtained in an action between third parties.³⁸

8. Bill payable six months after date. Evidence may be given of a contemporaneous *written* agreement to renew the bill on request.³⁹

³⁰ Cf. *Morris v. Baron & Co.*, [1918] A. C. 1 (oral rescission of written contract), and note s. 62 as to express waiver.

³¹ *National Sales Corp. v. Bernhardt*, [1931] 2 K. B. 188; *McCall Bros. v. Hargreaves*, [1932] 2 K. B. 562; *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 626.

³² Cf. *Suss v. Pompe* (1860), 30 L. J. C. P. 75, at p. 80, and s. 55.

³³ *Abrey v. Cruz* (1869), L. R. 5 C. P. 37; cf. s. 61.

³⁴ *Campbell v. Hodgson* (1819), Gow 74; 171 E. R.; cf. *Richards v. Richards* (1831), 2 B. & Ad. at pp. 454, 455.

³⁵ *Colahan v. Cooke* (1742), Willes 397; 125 E. R.; cf. s. 11 (2).

³⁶ Cf. *Drain v. Harvey* (1855), 17 C. B. (N.S.) 267; 144 E. R.

³⁷ *Ewin v. Lancaster* (1868), 6 B. & S. 571; 122 E. R.; *Overend v. Oriental Financ. Corp.* (1847), 7 H. L. 848; *Hubbard v. Gurney* (1876), 64 New York R. 467.

³⁸ *Foster v. Jolly* (1835), 1 C. M. & R. 703; 149 E. R.

³⁹ *Maillard v. Page* (1870), L. R. 5 Ex. 312. "If the agreement is merely collateral,

But this is really no exception to the general rule since it is evidence of an entirely collateral or independent agreement. There seems no reason why it should not be equally enforceable even if unwritten (apart from the Statute of Frauds). No doubt such collateral agreements are no answer to an action on the original bill or note, but there seems no reason why the collateral agreement should not be actionable, and why the acceptor should not set up the agreement by way of counterclaim against the payee.

9. Action on bill of exchange payable three months after date by indorsee against acceptor. Evidence is not admissible of a contemporaneous oral agreement with the drawer to renew the bill if the acceptor is not in a position to pay it at maturity, even though the indorsee was aware of the fact when he took the bill.⁴⁰

10. Action on a bill for £90. Evidence is not admissible to show that the acceptor and drawer agreed that only £60 should be paid, and that the payment should be by instalments, and this is so even though the indorsee is not a holder for value.⁴¹

11. A promissory note is made payable on demand. Evidence is not admissible to prove an oral agreement that payment should not be enforced till after the maker's death.⁴²

12. C makes an advance to B of £500, and B subsequently gives him a note for that amount. Evidence, it seems, is not admissible to show that the principal was not intended to be repaid, and that the note was only given to secure payment of interest during C's life.⁴³

13. Bill drawn in the ordinary form, payable to drawer's order, and accepted. D writes his name on the back. Oral evidence is not admissible to show that he intended thereby to guarantee the payment of the bill to the drawer. The Statute of Frauds requires all guarantees to be in writing and signed. *Sed quære*.⁴⁴

14. A note made by a company is indorsed by three directors in succession. In an action for contribution, evidence is admissible to

it only affords ground for a cross-action [or counter-claim], but there are many cases in which it has been held that the bill and the writing together form only one contract": per Channell, B., at p. 319.

⁴⁰ *New London Credit Syndicate v. Neale*, [1898] 2 Q. B. 487, C. A., following *Young v. Austen* (1869), L. R. 4 C. P. 553; but it is submitted that the acceptor would have an action against the drawer for breach of contract. See *supra*.

⁴¹ *Besant v. Cross* (1861), 10 C. B. 895; 138 E. R.

⁴² *Woodbridge v. Spooner* (1819), 3 B. & Ald. 288; 106 E. R.; cf. *Stott v. Fairlamb* (1833), 52 L. J. Q. B. 420.

⁴³ *Hill v. Wilson* (1873), L. R. 8 Ch. App. 888, at p. 898. It seems difficult to see why B should not counter-claim for rectification of the written agreement in the hands of C.

⁴⁴ *Steele v. M'Kinlay* (1880), 5 App. Cas. 754, H. L.; distinguished *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 625, H. L.; 29 Com. Cas. 818, at p. 837; and cf. *Macdonald v. Whitfield* (1883), 8 App. Cas. 733, at p. 746, per Lord Watson. Cf. the explanation by Goddard, J., of *Steele v. M'Kinlay* in *McCall Bros., Ltd. v. Hargreaves*, [1932] 2 K. B. 423, where that learned Judge found directly contrary to the above proposition.

show that they indorsed as co-sureties, and not as sureties in succession.⁴⁵

15. Promissory note given in payment for goods supplied to the maker. D indorses the note as surety, making a verbal agreement with the payee that he is not to be liable if the goods are not equal to sample. Evidence of this agreement is not admissible.⁴⁶ But no doubt he could have claimed (or in the appropriate case counter-claimed) against the seller for damages for breach of condition.

16. A sells goods to B and draws on him a bill payable to his own order. Before the goods are delivered C indorses the bill to guarantee B. B accepts the bill, and C hands back the bill to A. A completes the bill by making it payable to himself. If the bill is dishonoured, A can recover from C, the indorser, although he can only so recover on a variation of the written agreement, since an indorser is not liable to the drawer or payee, but *vice versa*.⁴⁷

As between immediate parties, a contemporaneous writing,⁴⁸ or a subsequent written agreement,⁴⁹ may control the effect of a bill, subject to the same conditions that would be requisite in the case of an ordinary contract; but the mere fact that a bill refers to a collateral writing or agreement which is conditional in its terms will not vitiate the bill in the hands of a person who has no notice of its contents.⁵⁰

Two further principles may be said to emerge (or possibly more correctly the above principles may be stated in these other forms) namely—1. Evidence is always admissible to prove what was the true relation of the parties at the time they entered into the contract evidenced by the bill or note; 2. "Evidence may be given of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend; and if evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter on which the written contract is silent."⁵¹

⁴⁵ *Macdonald v. Whitfield* (1888), 8 App. Cas. 783, P. C.; cf. *Batson v. King* (1869), 28 L. J. Ex. at p. 328; *National Sales Corporation v. Bernardi* (1931), 47 T. L. R. 380. *McCall Bros., Ltd. v. Hargreaves*, *supra*.

⁴⁶ *Hitchings v. Northern Leather Co. of America*, [1914] 3 K. B. 907. As a fact the maker kept the goods. *Seem* if he had rejected them D could have set up total failure of consideration.

⁴⁷ *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 625, H. L.; cf. *National Sales Corporation v. Bernardi* (*supra*).

⁴⁸ *Ct. Brown v. Langley* (1842), 4 M. & Gr. 466; 134 E. R.; *Salmon v. Webb* (1852), 3 H. L. Cas. 510; *Maillard v. Page* (1870), L. R. 5 Ex. 312, at p. 319.

⁴⁹ *McManus v. Bark* (1870), L. R. 5 Ex. 65.

⁵⁰ *Jury v. Barker* (1868), E. B. & D. 459; 120 E. R. See English and American cases reviewed, *Taylor v. Curry* (1871), 109 Massachusetts 26.

⁵¹ *Per Byles, J.*, in *Lindley v. Lacey* (1864), 34 L. J. C. P. 7, at p. 9 (written agreement, prior oral agreement to take up plaintiff's acceptance); *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 625, H. L. (action by drawer as payee against indorser); and cf. *Macdonald v. Whitfield* (1888), 8 App. Cas. 783, at p. 746 (successive indorsers as co-sureties).

Capacity and Authority of Parties

Capacity of parties.

22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.⁵²

Sub-s. 1 is declaratory. Sub-s. 2 is probably declaratory, but the law was not very clear. The word "minor" was added in committee as the Scottish equivalent of the English term "infant".

Capacity and authority.—Capacity must be distinguished from authority. Capacity means power to contract so as to bind oneself. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of law. Authority is derived from the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact. Again, capacity to incur liability must be distinguished from capacity to transfer. An executed contract is often legally effective where an executory contract is unenforceable. An indorsement usually consists of two distinct contracts—one executed, the other executory. It transfers the property in the bill, and it also involves a contingent assumption of liability on the part of the indorser.⁵³

Conflict of laws.—When laws conflict, capacity is for some purposes determined according to the *lex domicilii* of the contracting party, but for mercantile purposes it is probably determined by the *lex loci contractus*.⁵⁴

⁵² New York Negotiable Instruments Law, § 41.

⁵³ Is not the learned author here confusing two distinct ideas, conveyance (which he also calls an executed contract), and contract?

⁵⁴ Cf. *Sattomayor v. De Barros* (1877), 3 F. D. 1, at p. 5, C. A. (marriage); but as to mercantile contracts, see Westlake's *International Law*, 7th ed., p. 48; Dicey's *Conflict of Laws*, 4th ed., p. 599.

The continental codes for the most part draw a distinction between traders and non-traders, but English law now draws no such distinction as regards capacity to contract by bill or note.

Incapacity of one party.—The incapacity of one or more of the parties to a bill in no way diminishes the liability of the other parties thereto.⁵⁵ Thus the acceptor cannot set up the incapacity of the drawer (s. 54 (2)), and the drawer cannot set up the incapacity of the acceptor or payee, and the indorser cannot set up the incapacity of the drawer or a previous indorser—s. 55.

Clergyman.—A clergyman, though liable to penalties for trading, has full capacity to contract by bill.⁵⁶

Felon.—As to convicted felons, see the Forfeiture Act, 1870 (33 & 34 Vict. c. 28), ss. 8, 14, and 15.

Foreign Sovereign.—As to a foreign sovereign who in general can sue but cannot be sued, unless he chooses to submit himself to the jurisdiction, see p. 322.

Married woman.—At common law a married woman incurred no liability by drawing, indorsing, or accepting a bill,⁵⁷ unless she was a sole trader in the City of London, or unless her husband was *civiliter mortuus*, or an alien resident abroad. Subject, also, to the like exceptions, her indorsement did not transfer the property in a bill,⁵⁸ unless she indorsed it with her husband's consent.⁵⁹ In equity, however, if a married woman having available separate estate drew, indorsed, or accepted a bill, she was liable to the extent of such estate⁶⁰; and if the bill was part of her separate estate, her indorsement transferred it.

By s. 1 of the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 80), which came into force on November 1, 1935, "a married woman shall (a) be capable of acquiring, holding, and disposing of, any property; and (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation; and (c) be capable of suing and being sued, either in tort or in contract or otherwise; and (d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders, in all respects as if she were a *feme sole*". By s. 2 all her property shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly. It is necessary to add that a

⁵⁵ Cf. *Grey v. Cooper* (1782), 3 Dougl. 65; 99 E. R.; *Wauthier v. Wilson* (1912), 28 T. L. R. 299, C. A. (joint and several note); German Exchange Law, Art. 8.

⁵⁶ Cf. the Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 29, 31; *Lewis v. Bright* (1855), 24 L. J. Q. B. 191.

⁵⁷ *Cannam v. Farmer* (1849), 3 Exch. 698, note signed by married woman as widow.

⁵⁸ Cf. *Smith v. Marsack* (1848), 18 L. J. C. P. 66.

⁵⁹ *Prince v. Brunette* (1835), 1 Bing. N. C. 435; 181 E. R.

⁶⁰ *McHenry v. Davies* (1870), L. R. 10 Eq. 88.

feme sole enjoys in private law all the rights and obligations of a mere man. S. 3 of the same statute abolishes a husband's liability for his wife's torts. If a married woman signs a bill or note as surety for her husband, no presumption arises that she has done so under undue influence.⁶¹ When a married woman indorses a bill, her indorsement, of course, now transfers the property therein.

Lunatic or drunken man.—The contracts of a lunatic or drunken man, known to the other party to be in such a condition of mental incapacity, are voidable and not void.⁶² It is clear, therefore, that neither lunacy nor drunkenness can be set up against a holder in due course.⁶³ Complete drunkenness is a defence against an immediate party with notice.⁶⁴ Hallett, J., has recently considered mental incapacity in a drawer.⁶⁵

Minor or infant.—An infant incurs no liability by drawing, indorsing or accepting a bill, even if he represents himself to be of full age or ratifies the transaction on majority.⁶⁶ Thus :—

1. B, an infant, within three months of twenty-one, accepts a bill payable six months after date. He ratifies the transaction on attaining his majority, and the bill is negotiated. B is not liable on his acceptance.⁶⁶

2. B, after attaining his majority, accepts a bill to pay a debt contracted before his majority. The bill is indorsed to a holder in due course. The holder can sue B.⁶⁷ This decision has been questioned but it seems supportable on the ground that B gave a new promise after majority for which consideration was given by the holder.

3. B, after attaining his majority, accepts a bill to compromise a joint liability on a bill which he accepted during his minority. He is not liable to a holder with notice,⁶⁸ and not, it is suggested, even to a holder in due course.⁶⁹

⁶¹ *Howes v. Bishop*, [1909] 2 K. B. 390, C. A.

⁶² Pollock on Contracts, 11th ed., p. 75. As to proving against a lunatic's estate on a voluntary note, see *Re Whitaker* (1889), 42 Ch. D. 119, C. A. As to revocation of agent's authority by notice of principal's lunacy, see *Drew v. Nunn* (1879), 4 Q. B. D. 361, C. A.

⁶³ *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599, C. A. Cf. *Guildford Trust, Ltd. v. Pohl & Maritch* (1928), 72 S. J. 171.

⁶⁴ *Gore v. Gibson* (1845), 13 M. & W. 628; 153 E. R.; cf. *Tyler v. Maxwell* (1892), 30 Sc. L. R. 583, 585, Court of Session (acceptance given when drunk for losses at cards).

⁶⁵ *Manches v. Trimborn* (1916), 201 L. T. Journ. 135.

⁶⁶ Infants Relief Act, 1874 (37 & 38 Vict. c. 52); *Levene v. Brougham* (1909), 95 T. L. R. 265, C. A. (promissory note); *Leslie, Ltd. v. Shiell*, [1914] 3 K. B. 607, C. A. (loan), and if the substance of the action be contract, the infant cannot be made liable by suing him in tort, see at pp. 613, 620.

⁶⁷ *Ex p. Kibble* (1875), L. R. 10 Ch. 373.

⁶⁸ *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

⁶⁹ *Smith v. King*, [1892] 2 Q. B. 543.

⁷⁰ Cf. *Hutley v. Peacock*, *infra*.

4. An infant and his father make a joint and several promissory notes in consideration of money advanced to the infant. The father is liable on this note as a principal debtor.⁷⁰

5. An infant gives for value a post-dated cheque, dating it a few days after attaining his majority. He is not liable on this cheque.⁷¹

If the consideration for a bill given by an infant be necessities supplied to him, he may be liable for the goods supplied, though not on the bill.⁷² The age at which infancy ceases differs in different countries. In most continental countries a distinction is drawn between infant traders and non-traders, the former having full capacity. In England it was formerly held that an infant who traded and accepted bills was estopped from setting up his infancy,⁷³ but this ruling is no longer law.⁷⁴

By this section, when a bill is payable to the order of an infant, his indorsement transfers the property therein.⁷⁵ Since an infant can legally be an agent, his indorsement in that character gives rise to no difficulty. In America it is not uncommon to get a bill made payable to the order of an infant clerk. His indorsement then operates as an indorsement *sans recours*, though without openly discrediting the bill.

Liability of company or corporation.—A corporation incurs no liability by drawing, indorsing, or accepting a bill, unless expressly or impliedly empowered by its act of incorporation so to do.⁷⁶ Thus :—

1. A joint stock company is incorporated for the purpose of forming a *société anonyme* abroad for the construction of railways. The directors are empowered by the memorandum and articles of association to do whatever they may from time to time think incidental or conducive to the main object of the company. These terms cover the issue of bills, and such a company is liable on its acceptance.⁷⁷

2. A railway company, incorporated under an ordinary Railway Act, accepts bills which are negotiated. The company is not liable on its acceptances.⁷⁸

In the case of a trading corporation the fact of incorporation for the purposes of trade would give capacity. In the case of non-trading corporations, the power must be expressly given, or there

⁷⁰ *Wauthier v. Wilson* (1912), 28 T. L. R. 289, C. A.

⁷¹ *Hutley v. Peacock* (1913), 30 T. L. R. 42.

⁷² *Ex p. Margrett, Re Soltykoff*, [1891] 1 Q. B. 413, C. A.; cf. Chalmers' Sale of Goods Act, notes to § 2.

⁷³ *Ex p. Lynch* (1876), L. R. 2 Ch. D. 227.

⁷⁴ *Ex p. Jones* (1881), 18 Ch. D. 109, C. A.

⁷⁵ Cf. *Lebel v. Tucker* (1867), 8 B. & S. at p. 833; *Nightingale v. Withington* (1818), 15 Mass. 272; *Grey v. Cooper* (1782), 3 Dougl. 65; 99 E. R.

⁷⁶ *Re Peruvian Railways Co.* (1867), L. R. 2 Ch. 617; cf. *Sinclair v. Brougham*, [1914] A. C. 398, H. L. (building society carrying on *ultra vires* banking business).

⁷⁷ *Re Peruvian Railways Co.* (1867), L. R. 2 Ch. 617.

⁷⁸ *Bateman v. Mid Wales Ry.* (1866), L. R. 1 C. P. 499.

must be terms in the charter wide enough to include it. The Companies Act, 1862, s. 47,⁷⁰ did not confer capacity on all companies under that Act. It merely prescribed the mode in which such companies as had the requisite capacity were to exercise it.⁸⁰ A mining, a cemetery, a salvage, a gas, an alkali works, and a waterworks company, has each been held to be a non-trading company.⁸¹ See p. 70, as to non-trading partnerships. There is this distinction: A non-trading partnership can adopt a bill, but the bill of a company lacking capacity is, as regards the company, incurably bad; for a contract *ultra vires* of a corporation cannot be ratified. Query, if the rule as to drawing bills or making notes applies to cheques? Is a non-trading corporation liable on the instrument to the bearer of a dishonoured cheque which it has drawn, or is it only liable on the consideration to its immediate obligee? The practice of paying by cheque is so universal that perhaps capacity to contract by cheque may now be presumed. In America the capacity of a corporation to bind itself by bill or note is co-extensive with its capacity to contract.⁸² The capacity of a company ceases when a resolution to wind it up has been passed, although the resolution may not have been notified in the *Gazette*.⁸³

Power of corporation to transfer.—By this section, when a bill is payable to the order of a corporation, the indorsement of the corporation passes the property therein, though from want of capacity the corporation may not be liable as indorser.⁸⁴ So, too, bankers may be justified in paying cheques out of the funds of a company where clearly, by the form of the cheques, the company would not be liable as drawers if they should not be paid.⁸⁵

Alien enemies.—At common law an alien enemy is a person (other than a prisoner of war) who voluntarily resides or carries on business in hostile territory. Residence, and not nationality, is the test.⁸⁶

An alien enemy may be sued, and therefore he may defend and appeal from a judgment against him; but, except under licence from

⁷⁰ Now s. 30 of the Companies Act, 1929.

⁸⁰ Cf. *Re Peruvian Railways* (1867), L. R. 2 Ch. 617.

⁸¹ *Bateman v. Mid Wales Ry.* (1866), L. R. 1 C. P. 499, at p. 505.

⁸² *Parsons*, pp. 164, 165.

⁸³ *Bolognesi's Case* (1870), L. R. 5 Ch. 567.

⁸⁴ *Smith v. Johnson* (1858), 8 H. & N. 222; 27 L. J. Ex. 968; 157 E. R.

⁸⁵ *Mahony v. East Holyford Mining Co.* (1876), L. R. 7 H. L. 869, 884.

⁸⁶ *Driefontein Consolidated Mines v. Janson*, [1902] A. C. at p. 505, H. L.; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A. In other words, "local allegiance" is the test. *V/O Sonfracht v. N. V. Gebr. Van Udens, etc.*, [1948] A. C. 203. But though Belgium was largely occupied by the enemy, the fact that a company was incorporated in Belgium did not make it an enemy company: *Société Anonyme Belge v. Anglo-Belgian Agency*, [1915] 2 Ch. 409, C. A. As to bills drawn by prisoners of war, see *Antoine v. Moreshead* (1815), 6 Taunt. 287; 128 E. R.; cf. *Willison v. Patteson* (1817), 7 Taunt. at p. 449; 129 E. R. As to a British company under enemy control, see *The Daimler Co. Case*, [1916] 2 A. C. 807, H. L.

the Crown, he cannot sue in a British Court. If his cause of action accrued before war, his right to pursue it is suspended during war, but is not extinguished.⁸⁷

When war breaks out all commerce with the enemy (except under licence from the Crown) becomes illegal, and every contract with the enemy, in so far as it is executory, is dissolved if its due fulfilment involves intercourse with the enemy.⁸⁸ Thus, where a bill was drawn during war by an enemy alien on London, and was indorsed to an Englishman residing in hostile territory, it was held that it could not be enforced even after peace was concluded⁸⁹; the reason is obvious, if it were enforceable after the war it would be a valuable security upon which the alien enemy could raise money in a neutral country. Where a bill payable to drawer's order was drawn by a German firm, and accepted by an English firm before war, but was indorsed after war to an American firm with two alien enemy partners, the acceptor rightly refused payment.⁹⁰ The mere fact that there is on the bill the name of a person who has since its issue become an alien enemy does not destroy its validity in the hands of a holder who is not an alien enemy or claiming on his behalf.⁹¹

The common law rules may be extended or limited by statutes or proclamations relating to trade with the enemy: see, e.g., the Trading with the Enemy Acts, 1915 (5 & 6 Geo. 5, c. 98) and 1939, which gave power to prohibit trading with persons of enemy nationality or enemy association, though not resident or carrying on business in enemy territory or enemy occupied territory.

Although bills may be accepted for payment in a country overrun by the enemy (e.g., Holland in 1940), if a party liable thereon is in England he can be sued.⁹²

⁸⁷ *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; see at p. 873 as to suspension. An alien enemy cannot be the actor in any legal proceeding: cf. *Ex p. Marum* (1915), 84 L. J. K. B. 1898 (proof in bankruptcy). But as to *pro forma* joinder in partnership action, see *Rodriguez v. Speyer Bros.*, [1919] A. C. 59, H. L. See, too, *Biedermann v. Allhausen & Co.* (1921), 87 T. L. R. 862 (bill accepted before war, interest during war not payable).

⁸⁸ *Zinc Corporation, Ltd. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A. C. 260. Contrast *Ottoman Bank v. Jebara*, [1928] A. C. 269, case of a contract not abrogated by war because fulfilment involved no intercourse with the enemy. Cf. *Shering v. Stockholms Bank*, [1946] 1 A. E. R. 37.

⁸⁹ *Willison v. Patteson* (1817), 7 Taunt. 439; 129 E. R. Per Gibbs, C.J.: "An alien enemy resident in France has no right to draw on this country for a fund due to him here; it is the very sort of communication which the policy of the law meant to prevent". Cf. *Shering v. Stockholms Bank*, *supra*. As to licence to trade, see *Disconto Gesellschaft v. Brandt* (1915), 31 T. L. R. 586.

⁹⁰ *S. M. Weld v. Fruhling and Goschen* (1916), 32 T. L. R. 469.

⁹¹ See *Wilson v. Ragasine & Co.* (1918), 81 T. L. R. 264.

⁹² *Cornelius v. Banque Franco Serbe*, [1942] 1 K. B. 29; *Bank Polski v. Mulder & Co.*, [1942] 1 K. B. 497. See a, 19 (c).

Termination of war.—Apart from special treaties, August 31, 1921, was fixed as a general date for the termination of the 1914—1918 war.⁹¹

Statutory Disabilities of Bankers

Banker and banking company.—It is unlawful for a banker or banking company, other than the Bank of England—

- (a) To issue in England or Wales any bill of exchange or promissory note which is expressed to be, or in legal effect is, payable to bearer on demand.⁹²
- (b) To draw, accept, make, or issue in England or Wales any bill of exchange or promissory note which is expressed to be, or in legal effect is, payable to bearer on demand, or to borrow, owe, or take up any sum or sums of money on such bill or note.⁹³

*Exceptions exist in favour of any banker or banking company who was lawfully issuing such bills or notes on May 6, 1844, subject to certain conditions.*⁹⁴

The last private bank having the right to issue bank-notes disappeared when Messrs. Fox, Fowler & Co. were merged in Lloyds Bank in 1921. The Bank of England is now the only bank in England having the right of note issue. See s. 97 (3) (c), saving the privileges of the Bank of England.

By s. 360 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 28), a bank which is registered as a limited company is nevertheless liable without limit on its notes.

As to annual return of bankers showing names and addresses of partners, see s. 21 of the Bank Charter Act, 1844 (7 & 8 Vict. c. 32); and cf. ss. 144 and 145 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 28).

As to the varying systems of note issue in Scotland and Ireland, see *Conant's Banks of Issue*; *Palgrave's Dictionary of Political Economy*, tit. "Banks" (United Kingdom).

Signature essential to liability.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such⁹⁵; Provided that—

⁹¹ See Order in Council, 1921, pursuant to the Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. 5, c. 59).

⁹² 7 & 8 Vict. c. 32, ss. 10 and 28 (Bank Charter Act, 1844), as explained by 17 & 18 Vict. c. 88, ss. 11 and 12.

⁹³ 7 & 8 Vict. c. 32, ss. 11 and 28, as explained by 17 & 18 Vict. c. 88, s. 11.

⁹⁴ *Ibid.*

⁹⁵ Cf. *Fenn v. Harrison* (1790), 3 T. R. at p. 781; 100 E. R.; *Beckham v. Drake* (1841), 9 M. & W. at p. 92; 162 E. R.; *Re Adanson & Co.* (1874), 43 L. J. Ch. at p. 734, *per James, L.J.*; New York Negotiable Instruments Law, § 37. For a statutory exception, see s. 93 of the Companies Act, 1929, p. 360.

- (1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name.⁹⁸
- (2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.⁹⁹

ILLUSTRATIONS

1. D is the holder of a bill indorsed in blank by C. D converts C's indorsement in blank into a special indorsement to E, and transfers the bill to the latter. D is not liable as indorser¹; not having signed the bill but only having converted an indorsement as empowered by s. 84 (4).

2. A, who is agent for X, draws a bill in his own name. The payee knows that A is only an agent. A alone is liable as drawer of this bill. X is not²

3. B and X are jointly indebted to C. B alone makes a note in favour of C for the amount of the debt. B alone is liable on the note.³

4. A draws a bill, signing it "J. A., agent". A alone is liable as drawer. His undisclosed principal is not.⁴

5. X, a partner in a firm which trades as "John Brown", makes a note for £100 in respect of a partnership transaction, signing it as "Brown & Co." He has no authority from his partners to vary the firm style. The firm is not liable on this note, though X individually is bound by it.⁵

6. A is a partner in "B & Co." A, in respect of a partnership transaction, draws a bill in his individual name on "B & Co." It is refused acceptance. A alone is liable as drawer; his co-partners are not.⁶

7. John Smith carries on business under the name of "John Brown", or "Brown & Co.", or "The London Iron Company". John Smith is liable on a bill drawn, indorsed, or accepted by him in any of these names.⁷

8. A principal trades and carries on a business in the name of one of his agents (a clerk). He is liable on a bill accepted by the clerk in his own name in respect of that business (it coming within the clerk's ostensible authority), although the clerk

⁹⁸ Cf. *Lindus v. Bradwell* (1848), 5 C. B. at p. 591; 136 E. R.; *Trueman v. Loder* (1840), 11 A. & E. at p. 594; 118 E. R. By s. 2, "person" includes a body of persons, whether incorporated or not.

⁹⁹ *Pooley v. Driver* (1876), 5 Ch. D. 458; *Gurney v. Evans* (1858), 27 L. J. Ex. 166; cf. *R. v. Holden*, [1912] 1 K. B. 884, C. C. A.

¹ *Vincent v. Horlock* (1808), 1 Camp. 442; 170 E. R.

² Cf. *Leadbitter v. Farrow* (1816), 5 M. & S. at p. 350; 105 E. R.; *Ex p. Rayner* (1868), 17 W. R. 64. Conversely a clerk who draws a bill in the name of a firm whose affairs he is winding up, two of the partners being dead, is not liable on the bill: *Wilson v. Barthrop* (1867), 2 M. & W. 868; 150 E. R.

³ *Stiffkin v. Walker* (1809), 2 Camp. 308; 170 E. R.

⁴ *Pentz v. Stanton* (1838), 10 Wend. 271, New York.

⁵ *Faith v. Richmond* (1840), 11 A. & E. 839; 118 E. R.; *Kirk v. Blurton* (1841), 9 M. & W. 284; Lindley, 9th ed., pp. 252, 258. If X's partners had authorised the change of style, the altered style would have been *pro hac vice* the firm style, and binding on them. The firm, too, is bound if the variation in style be immaterial and unintentional: *Forbes v. Marshall* (1856), 11 Exch. 166. As to an accidental misspelling, see *Leonard v. Wilson* (1884), 2 Cr. & M. 589; 149 E. R.; *Kirk v. Blurton* (1841), 9 M. & W. at p. 289; 152 E. R. And if there be not a distinct firm style, it seems a partner may for firm purposes sign the individual names of his co-partners: *Norton v. Seymour* (1847), 16 L. J. C. P. 100.

⁶ *Nicholson v. Ricketts* (1860), 29 L. J. Q. B. at p. 66; *Re Adanson Co.* (1874), 43 L. J. Ch. 732 (firm composed of four firms).

⁷ Cf. *Wilds v. Keep* (1834), 6 C. & P. 235; 172 E. R.; *Forman v. Jacob* (1815), 1 Stark. 47; 171 E. R.; *Lindus v. Bradwell* (1848), 5 C. B. at p. 591; 136 E. R.; and *Trueman v. Loder* (1840), 11 A. & E. at p. 594; 118 E. R.

in accepting it acted contrary to his master's private instructions.⁸ So too, a firm may trade under its firm name in one place, and under the name of one of the partners in another place. The latter's name then becomes the firm name.⁹

9. J. B. carries on business in his own name with a dormant partner. If he accepts a bill on his private account, the dormant partner is not liable, but it lies on the dormant partner to show that the bill was not a firm bill.¹⁰

By s. 2, "person" includes a body of persons whether incorporated or not. An exception to the rule laid down in this section is created by s. 93 of the Companies Act, 1929, p. 360, which is saved by s. 97 (8). Any officer of the company who varies the style of the company is personally liable under that section.

By s. 91, the signature may be written by the hand of an agent, but it must be the principal's name that is signed, not the agent's. The seal of a corporation may be equivalent to a signature—s. 91 (2).

Bills and notes form an exception to the ordinary rule that, when a contract is made by an agent in his own name, evidence is admissible to charge the undisclosed principal, though not to discharge the agent. A person who has not signed, though not liable on the instrument, will, of course, be liable on the consideration of the precedent transaction, conditionally on the dishonour of the instrument, unless the instrument was taken as an absolute discharge of the joint liability, when, on the analogy of *Hirachand v. Temple* (p. 815), such person would be discharged. And so X would be so liable in Illustration 8. The distinctions are: In the one case the liability is transferable; in the other it is not; further, the *onus probandi* is shifted.

Partners.—The signature of a firm is deemed to be the signature of all persons who are partners in the firm, whether working, dormant, or secret,¹¹ or who, by holding themselves out as partners, are liable as such to third parties.¹²

Where the name of a firm and the name of one of the partners in it are the same, and that partner draws, indorses, or accepts a bill in the common name, the signature is *prima facie* deemed to be the signature of the firm: but the presumption may be rebutted by showing that the bill was not given for partnership purposes or under

⁸ *Edmunds v. Bushell* (1865), L. R. 1 Q. B. 97; cf. *Conro v. Port Henry Iron Co.* (1851), 12 Barb. 27, New York.

⁹ *Cf. Alliance Bank v. Kearsley* (1871), L. R. 6 Q. P. at p. 438, Willes, J.

¹⁰ *Yorkshire Banking Co. v. Bealson* (1880), 5 C. P. D. 109, C. A., discussing the previous cases.

¹¹ *Paoley v. Driver* (1876), 5 Ch. D. 458; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 4. S. 6 of that Act, which deals with authority to bind a firm, expressly saves any general rule of law relating to negotiable instruments.

¹² *Gurney v. Evans* (1858), 27 L. J. Ex. 166; Partnership Act, 1890, s. 14. By the Limited Partnership Act, 1907 (7 Edw. 7, c. 24), the liability of a limited partner is restricted to the amount of his share in the firm.

the authority of the firm, and in these matters the intention or belief of the person taking the instrument is immaterial.¹³

It was formerly thought that where two distinct firms, having one or more partners in common, carried on business under the same name, each firm was liable on the acceptances of the other to a holder for value without notice. But since the case of *Yorkshire Banking Co. v. Beatson*, it seems clear that no such hard rule exists.¹⁴

The case of a non-trading firm illustrates the distinction between capacity and authority. The partners in a non-trading firm have full capacity to bind themselves by indorsing or accepting bills; but though the capacity is present, there is no presumption that a partner who signs the firm name, or the names of his co-partners, has any authority to bind his co-partners. He who signs is, of course, bound, and so are his co-partners if they have authorised his act, or if they subsequently ratify it, but not otherwise. The law on this point may, perhaps, be summed up as follows:—

Trading firm.—A partner in a trading firm has *prima facie* authority to bind the firm by drawing, indorsing, or accepting bills in the firm name for partnership purposes; and if the bill get into the hands of a holder in due course, the presumption of authority becomes absolute, and it is immaterial whether it were given for partnership purposes or not¹⁵; but if the person taking the instrument knows that it has been given without the authority or consent of the other partners then he (as distinguished from a holder in due course) cannot charge those partners; this applies equally to a trading firm.¹⁶ Thus:—

1. X, a partner in a trading firm, makes a note in the firm's name, payable to C, and gives it to him in payment of a private debt. It lies on C to show that X had authority from his co-partners so to do.¹⁷ If C indorses to D, a holder in due course, the authority is irrebuttably presumed.¹⁸

2. A draws two bills on a trading firm in respect of one and the same debt. By mistake both bills are accepted. The bills are negotiated to holders in due course. The firm is liable on both bills.¹⁹

3. A partner accepts in the firm name a bill drawn on the firm in respect of a debt partly due from the firm and partly due from himself alone. Fraud is negatived, but the holder knows the facts.

¹³ *Yorkshire Banking Co. v. Beatson* (1880), 5 C. P. D. 109, C. A.

¹⁴ *Ibid.*; and Lindley, 9th ed., p. 249.

¹⁵ *Bank of Australasia v. Breillat* (1847), 6 Moore P. C. 152, at p. 194, 13 E. R.; *Wiseman v. Easton* (1863), 8 L. T. (N.S.) 637; cf. s. 5 of the Partnership Act, 1890.

¹⁶ Partnership Act, 1890, s. 5.

¹⁷ Cf. *Lepinson v. Lane* (1862), 32 L. J. C. P. 10.

¹⁸ *Wiseman v. Easton* (*supra*), and ss. 5 and 6 of the Partnership Act.

¹⁹ *Davison v. Robertson* (1815), 3 Dow. 218; 3 E. R., H. L.

Apparently the firm is liable on the instrument to the extent of its indebtedness.²⁰

In case 8 the safe plan is to sue on the consideration. This rule and the next below dealing with non-trading firms are merely deductions from the general rule that a partner has implied authority to do any act necessarily incidental to the proper conduct of the partnership business, and that there the presumption of authority ends.

There is a quasi-exception to the general rule where the name of the firm is the same as the name of one of the partners in it. In that case an acceptance in the common name, written by the partner whose name it is, may be shown to be his individual acceptance and not binding on the firm.²¹

Non-trading firm.—A partner in a non-trading partnership has *prima facie* no authority to render his co-partners liable by signing bills in the partnership name. The holder, even a holder in due course, must show authority, actual or ostensible.²²

Professional partnerships (*e.g.*, solicitors),²³ mining,²⁴ and agricultural partnerships,²⁵ commission agencies,²⁶ and cinema proprietors,²⁷ have been held non-trading: and auctioneers, perhaps, are non-traders²⁸; but banking is a trading partnership.²⁹ In America physicians, tavern-keepers, tunnel-workers, and farmers have been held non-traders.³⁰ In *Harris v. Amery*,³¹ Willes, J., points out that the term "trade" is not co-extensive with the term "business".

It does not seem to be decided how far the rule applies to cheques, as well as to bills and notes. The question cannot often arise, because opening an account in the firm name is evidence of actual authority. Authority to draw cheques is no evidence of authority to draw bills; a post-dated cheque is, for this purpose at least, a bill.³²

Power of partner to transfer.—Where a bill is payable to the order of a firm, a partner who cannot render his co-partners liable on his indorsement, may transfer the property therein by negotiating it in the firm name.³³ Thus:—

²⁰ *Ellston v. Deacon* (1866), L. R. 2 C. P. at p. 21.

²¹ *Yorkshire Banking Co. v. Beaton* (1880), 5 C. P. D. 109, C. A.

²² *Dickinson v. Valpy* (1899), 10 B. & C. at p. 187; 109 E. R.; *Thicknesse v. Bromilow* (1892), 2 Cr. & J. 425; 149 E. R.

²³ *Garland v. Jacomb* (1878), L. R. 8 Ex. at p. 219.

²⁴ *Rickalls v. Bennett* (1847), 4 C. B. at p. 99; 186 E. R.

²⁵ *Kimbro v. Bullit* (1859), 20 Howard 256.

²⁶ *Yates v. Dalton* (1858), 28 L. J. Ex. 69.

²⁷ *Higgins v. Beauchamp*, [1914] 3 K. B. 1192.

²⁸ *Wheatley v. Smithers*, [1906] 2 K. B. 321; affirmed on a different ground, *viz.*, authority in fact, *ibid.*, [1907] 2 K. B. 664, C. A.

²⁹ *Bank of Australasia v. Breillat* (1847), 6 Moore P. C. 152, at p. 194; 18 E. R.

³⁰ *Parsons on Partnership*, 2nd ed., p. 99, n.

³¹ (1865), L. R. 1 C. P. at p. 154.

³² *Forster v. Mackreth* (1867), L. R. 2 Ex. 163.

³³ *Landley*. 9th ed., p. 189; cf. *Pollock*, 12th ed., pp. 38—35.

1. Bill specially indorsed to a non-trading partnership. One of the partners, without communicating with his co-partners, indorses it away for a firm debt. The property in the bill passes to the indorsee.³⁴

2. Bill specially indorsed to a firm under a wrong style (e.g., to "Smith, Brown & Co.", whereas the proper style is "Brown & Co."). One of the partners indorses it away, using, without the assent of the rest, the wrong style. The firm is not liable on the indorsement, but the property in the bill passes to the indorsee (*sed quære*).³⁵

When a bill payable to the order of a firm is indorsed by a partner in the firm name, in fraud of his co-partners, the property therein does not pass to an indorsee with notice.³⁶ The technical difficulties in the way of an action for conversion brought by the firm probably no longer exist, or at least would be disregarded since the widening of the idea of conversion (e.g., Lord Atkin's speech in *Midland Bank v. Reckitt*, [1988] A. C. 1) and the provisions regarding joint tortfeasors in the Law Reform (Married Women and Tortfeasors) Act, 1935. In such case the proper course, perhaps, is to give notice to the acceptor not to pay. He could defend an action against a holder with notice. If the bill has been paid, an action lies for money had and received.³⁷

Ex-partners.—When a bill is payable to the order of a firm, and the partnership is subsequently dissolved, the indorsement of an ex-partner in the late firm name transfers the property therein and authorises the payment thereof.³⁸

Lewis v. Reilly,³⁹ decided in 1841, is now open to question, in so far as it lays down that an ex-partner, by indorsing a bill in the late firm name, renders his former partners liable as indorsers to a holder with notice of the dissolution.⁴⁰ The question now turns on the true construction to be put on s. 88 of the Partnership Act, 1890 (58 & 59 Vict. c. 39). Where a partner retires from his firm, but the business is carried on, he may still be liable on the firm's bills if he has not given proper notice of his retirement. His liability rests on the doctrine of "holding out", which is now embodied in s. 14 of that Act.⁴¹

³⁴ Cf. *Smith v. Johnson* (1858), 3 H. & N. 222; 27 L. J. Ex. 368; 157 E. R.

³⁵ *Williamson v. Johnson* (1828), 1 B. & C. 146; 107 E. R.; *Kirk v. Blurton* (1841), 9 M. & W. at p. 287; 152 E. R.

³⁶ *Heilbut v. Newell* (1870), L. R. 5 C. P. 478, Ex. Ch.

³⁷ *Ibid.*

³⁸ *King v. Smith* (1829), 4 C. & P. 108; 172 E. R.; *Lewis v. Reilly* (1841), 1 Q. B. 349; 118 E. R.

³⁹ (1841), 1 Q. B. 349; 118 E. R.

⁴⁰ *Kilgour v. Finlayson* (1789), 1 H. Bl. 155; 126 E. R.; *Abel v. Sutton* (1800), 3 Esp. 108; *Anderson v. Weston* (1840), 6 Bing. N. C. 296; 133 E. R. See *passim* *Odell v. Cormack* (1887), 19 Q. B. D. 228, as to dissolution.

⁴¹ *Lindley on Partnership*, 9th ed., pp. 78 *et seq.*; and cf. *Ex p. Central Bank of London*, [1892] 2 Q. B. 688, C. A., which arose before the Act.

Business names.—As to the registration of business names and the disabilities of parties in default, see the Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 28), s. 8.

Forged or unauthorised signature.

24. Subject to the provisions of this Act,⁴² where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.⁴³

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.⁴⁴

ILLUSTRATIONS

1. A bill is payable to the order of John Smith. Another person of the same name gets hold of it, and indorses it to D, who takes it as a holder in due course. D acquires no title to the bill; he cannot enforce payment against any party thereto⁴⁵, and should any party pay him, the payment is invalid.⁴⁶

2. A note payable to order is stolen from the payee. The thief forges the payee's indorsement, and collects the note from the maker's banker, who returns the note to the maker. The payee can recover the amount of the note from the maker in an action for conversion of the note.⁴⁷

3. A bill is payable to C's order. His indorsement is forged. D, a subsequent holder, presents the bill for acceptance. The drawee accepts it payable at his bankers. The bankers pay D. They cannot debit the acceptor with this payment.⁴⁸

4. A bill purporting to be drawn by A to the order of C & Co., and to be indorsed by them, is accepted by the drawee payable at his bankers, and at maturity is paid by them. A is a customer of the acceptor's, who often drew bills payable to C & Co. It turns out afterwards that the drawer's and payee's names and signatures were forged by a clerk of the acceptor's, who stole the proceeds of the bills. The bank can debit the acceptor's account with this payment—the bill never having been pay-

⁴² The provisions referred to are s. 54 (2), s. 55 (2), for estoppels; and ss. 80, 80, and 82 (protection to bankers paying demand drafts, or collecting crossed cheques). See s. 7 (3) as to fictitious payees; and s. 25 (procuration signatures).

⁴³ Cf. New York Negotiable Instruments Law, § 42, and cases cited in Crawford's edition. As to "preclusion" or estoppel, see p. 75.

⁴⁴ For definition of forgery, see s. 1 of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), as extended by s. 33 of the Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86).

⁴⁵ *Mead v. Young* (1790), 4 T. R. 28; 100 E. R.

⁴⁶ *Graves v. American Bank* (1858), 17 New York R. 205; cf. *Ogden v. Benas* (1874), L. R. 9 C. P. 513.

⁴⁷ *Johnson v. Windle* (1836), 3 Bing. N. C. 225; 132 E. R.

⁴⁸ *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch. Ss. 54 and 60 did not apply.

able to the real C & Co.—and therefore the payees were fictitious persons and so the bill was payable to bearer under s. 7 (3).⁴⁹

5. A bill is payable to the order of a firm. X, one of the partners, fraudulently indorses it in the firm name to D in payment of a private debt. The acceptor pays D. X becomes bankrupt. X's co-partners and trustee can recover from D the money he received on the bill,⁵⁰ since D knew of the irregularity.

6. C specially indorses a bill to D. It is stolen before delivery to D, and D's indorsement in blank is forged on it. It comes into X's hands, and he gets his bankers to present it for payment. They receive payment, and credit X with the amount. X subsequently draws out the whole sum. C can recover the amount of the bill from the bankers.⁵¹

7. Note for £100. X forges B's signature to it as maker. Before the note matures the holder finds out that B's signature is a forgery, and threatens to prosecute X. In order to prevent this, B gives the holder a memorandum, which says, "I hold myself responsible for the note for £100 bearing my signature". The ratification is invalid. B is not liable on the note.⁵²

8. A draws a bill payable to C's order. As between A and C the consideration is fraudulent. X forges C's indorsement, and negotiates the bill to D, who takes it in good faith. D finds out that C's indorsement has been forged, and after the bill is due he obtains a genuine indorsement from C, giving him half the value of the bill. D cannot sue A⁵³; he is a party to the illegality.

9. B's acceptance to a bill is forged. A holder who takes it *bona fide* is afterwards informed that the signature is not B's, and accordingly writes to inquire. B writes back to say the signature is his. B is liable on this acceptance.⁵⁴

10. X, a partner in a trading firm, fraudulently accepts a bill in the firm name for a private debt of his own. It is negotiated to a holder for value without notice. The firm is estopped from setting up X's fraud.⁵⁵

11. The acceptor of a bill forges A's name thereon as drawer, then discounts it with a bank. The bill is dishonoured, and notice sent to A. The acceptor gets the bill renewed for a smaller sum, paying the difference in cash to the bank, and on the renewal again forges A's name as drawer. The renewed bill is dishonoured, and notice sent to A. A does not repudiate the transaction for fourteen days after receipt of the first notice. He is not estopped from setting up that his signature was forged,⁵⁶ since the bank's position had not altered in the interim (even if A were under a duty to inform the bank after its notice).

12. X forges B's acceptance. B pays the holder. Afterwards X again forges B's acceptance, which, unknown to B, gets into the hands of the same holder. B may set up that his signature was forged⁵⁷; *sed quære*.

⁴⁹ *Bank of England v. Vagliano*, [1891] A. C. 107, H. L.; reversing *Vagliano v. Bank of England* (1889), 23 Q. B. D. 243, C. A. See pp. 23 and 24, and contrast *N. and S. Wales Bank v. Macbeth*, [1908] A. C. 137.

⁵⁰ *Heilbut v. Nevill* (1870), L. R. 5 C. P. 478, Ex. Ch.

⁵¹ *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578; cf. *Charles v. Blackwell* (1877), 2 C. P. D. at p. 157, and cases cited under s. 82, which did not (and would not to-day) apply to this case. It was not a cheque.

⁵² *Brook v. Hook* (1871), L. R. 6 Ex. 80; *Ex p. Edwards* (1841), 2 Mon. D. & D. 241; but see *Greenwood v. Martins Bank*, [1938] A. C. 51; and cf. *Williams v. Bayley* (1866), L. R. 1 H. L. 200, at p. 221.

⁵³ *Esdaile v. La Nauze* (1835), 1 Y. & C. 394; 62 E. R.

⁵⁴ *Brook v. Hook* (1871), L. R. 6 Ex. at p. 100; *Wilkinson v. Stoney* (1889), 1 J. & S. 508; *Robarts v. Tucker* (1861), 16 Q. B. at p. 577.

⁵⁵ *Hogg v. Skeen* (1865), 18 C. B. (N.S.) at p. 432; 144 E. R.; 84 L. J. C. P. at p. 155, Willes, J.

⁵⁶ *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82, H. L., followed *British Linen Co. v. Cowan* (1906), 8 F. 704 (Scotland); cf. *Ogilvie v. West Australian Mortgage Corp.*, [1896] A. C. 257, 268, P. C. *Aliter*, if the bank's position had in the meantime been altered prejudicially: *ibid.*; and see *William Ewing & Co. v. Dominion Bank*, [1904] A. C. 806, 807, P. C., where leave to appeal was refused. The case is reported in full, 35 Canada Sup. Court Reports, p. 123.

⁵⁷ *Morris v. Bethell* (1869), L. R. 5 C. P. 47, but probably overruled by *Greenwood v. Martins Bank*, [1938] A. C. 51.

13. X forges B's acceptance, and, in consideration of B's paying it, gives him a bill of sale. A seizure under this bill of sale cannot be set aside by X's trustee in bankruptcy.⁵⁸

14. A letter of credit on a bank is granted in favour of C, whose clerk gets possession of it, forges C's name to a draft, and obtains the money. The bank is not discharged by this payment.⁵⁹

15. X steals an uncrossed cheque payable to C, his employer, forges his employer's indorsement, and pays the cheque into his own bank. The bank credits X's account with the amount of the cheque, cross the cheque for collection, and collect it. This is a conversion of the cheque for which the bank is liable to C, the true owner.⁶⁰

16. A cheque is drawn in Roumania on London in favour of C & Co., who indorse it to their agents, D & Co. The cheque is stolen and D & Co.'s indorsement is forged. The cheque is cashed by a Vienna bank and forwarded to a London bank, who collect the amount. By Austrian law the Vienna bank, who acted honestly and without negligence, acquired a good title. The London bank is not liable to C & Co. for the conversion of the cheque.⁶¹

17. X by fraud induces A to draw a cheque in favour of C. X then forges C's indorsement and pays the cheque in to his own bankers, who collect the amount. The bankers are liable to A for converting the cheque, and it is immaterial that A may be indebted to X on another transaction. The bankers cannot set off the debt due to the forger.⁶²

18. X, without authority, opens a banking account in the name of A and pays into it a large cheque which has been extorted by blackmail. X afterwards forges A's name and draws out the money so paid in. The bank is not liable to A, because the account is a fictitious account.⁶³

19. A's wife forged his name to several cheques as drawer. When A discovered the forgeries, he kept silent as he did not wish to cause any bother or to give his wife away. Later his wife shot herself and he then sought declarations that the bank had wrongfully debited his accounts with several cheques to which his signature had been forged by his wife. The bank was not liable because A was estopped from setting up the forgeries by reason of his silence when a disclosure would have enabled the bank to sue his wife and him for her tort; that right the bank lost by her death,⁶⁴ as the law then was.

By s. 60, a banker who pays a demand draft drawn on him and held under a forged indorsement is protected, and so is a banker who collects a crossed cheque for his customer—see s. 82. For further illustrations see also note on recovery of money paid by mistake, p. 201, and s. 7 (8), as to fictitious payees.

Ratification.—Illustration 7 is founded on the familiar proposition that a forgery cannot be ratified, and the language of the Act seems

⁵⁸ *Ex p. Caldecott, re Maplebeck* (1876), 4 Ch. D. 150, C. A.

⁵⁹ *Orr v. Union Bank* (1854), 1 Macq. H. L. 518.

⁶⁰ *Gordon v. Capital and Counties Bank*, [1902] 1 K. B. 242, C. A.; affirmed, H. L., [1903] A. C. 240; but see now Bills of Exchange (Crossed Cheques) Act, 1906, p. 358.

⁶¹ *Embiricos v. Anglo-Austrian Bank*, [1904] 2 K. B. 870; affirmed, [1905] 1 K. B. 877, C. A. See note, p. 237. *Qu.* if the cheque were stopped, would the drawer be liable to a person who held *bona fide* under the forged indorsement? Probably he would be liable.

⁶² *North and South Wales Bank v. Macbeth*, [1908] A. C. 137, H. L. (*Irvine's Case*). For some reason or other (possibly the same as in *Gordon v. Capital and Counties Bank*, *supra*) the appellant bank could not rely on s. 82.

⁶³ *Robinson v. Midland Bank* (1925), 41 T. L. R. 402, C. A.

⁶⁴ *Greenwood v. Martins Bank*, [1933] A. C. 51. The substance of the argument, but not the logic of its construction, has now been destroyed by the Law Reform (Miscellaneous Provisions) Act, 1934 (abatement of actions and loss of right of action on death), and Law Reform (Married Women and Tortfeasors) Act, 1935 (husband's liability for his wife's torts).

to countenance this view. The arid logic justifying this is that a forger does not act, and does not purport to act, on behalf of the person whose name he forges and that there is, therefore, nothing on which ratification can be grounded. But in *Greenwood's Case* Lord Tomlin's speech makes no reference to this artificial proposition and indeed may be said to have denied it when he said "the necessary elements for ratification were not present, and adoption, as understood in English law, requires valuable consideration, which is not even suggested here". And so, although forgery may be barred the door, estoppel and adoption fly through the window to accomplish the same purpose; the party is liable although his signature has been forged. In a Scottish appeal before the Act, Lord Blackburn said that a forgery could be ratified,⁶⁵ but the English cases were not cited, and the decision turned on the ground that the facts had not created an estoppel. "A document cannot be a forged instrument as between certain persons and not as between others",⁶⁶ but one person may be estopped from setting up the forgery while another may not.

Estoppels.—The word "precluded" was inserted in committee in lieu of the word "estopped", an English technical term unknown to Scottish law. Whether a forgery can be ratified or not, it is clear that a person whose signature has been forged may by his conduct be estopped from denying its genuineness to an innocent holder (Illustration 9); and, again, a party to a bill may be estopped by his conduct,⁶⁷ or in certain cases by the fact of becoming a party,⁶⁸ from setting up that the signatures of other parties thereto are forged or unauthorised. When an estoppel by negligence is relied on, it must be shown that the negligence was the direct and proximate cause of the forgery being taken as genuine.⁶⁹ It must be the *causa causans* and not merely the *causa sine qua non*. The requirements of such an estoppel have now received their classic mode in Lord Tomlin's speech in *Greenwood v. Martins Bank*.⁷⁰ There was formerly some slight ground for the fantastic contention that when a married woman's indorsement was forged by her husband, the property in

⁶⁵ *M'Kenzie v. British Linen Co.* (1881), 8 App. Cas. at p. 99, H. L. But see *Greenwood v. Martins Bank*, [1938] A. C. 51.

⁶⁶ *Morison v. London County & Westminster Bank*, [1914] 3 K. B. at p. 374, C. A.

⁶⁷ *Arnold v. Cheque Bank* (1876), 1 Q. P. D. 578; *Patent Safety Gun Cotton Co. v. Wilson* (1880), 49 L. J. C. P. 719, C. A.

⁶⁸ As to drawer, see s. 55 (1); maker of note, s. 88 (2); indorser, s. 55 (2); acceptor, s. 54; acceptor for honour, s. 86, note; fictitious payee, s. 7 (3); fictitious drawee, s. 5 (2).

⁶⁹ *Arnold v. Cheque Bank* (1876), 1 Q. P. D. 578; cf. *Lewis Sanitary Laundry Co. v. Barclay, Bevan & Co.* (1906), 11 Com. Cas. 255, at p. 287; *Smith v. Prosser*, [1907] 2 K. B. at p. 746, C. A.; *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. at p. 1022; *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777; 23 Com. Cas. 415, H. L., reviewing the previous cases.

⁷⁰ [1938] A. C. 51.

the bill passed to a holder in due course,⁷¹ but since the Married Women's Property Act and the Law Reform (Married Women and Tortfeasors) Act, 1935, and this Act, it is clear that this contention could no longer be successfully argued.

Injunction, etc.—Where a bill is held under a forged signature, the Court can restrain its negotiation by injunction, or order it to be given up and cancelled.⁷²

Fraudulent alteration.—A bill held under a forged signature must be distinguished from a bill with genuine signatures which has been fraudulently altered; such fraudulent alteration may amount to the crime of forgery. See s. 64.

Foreign laws.—Under the continental codes the payer is not bound to verify the genuineness of the indorsements, and in some countries a *bona fide* holder for value can make a good title through a forged indorsement.

Illustration 16 shows that this section must be read subject to the rules of international law, and that the transfer of a chattel is governed by the law of the place of transfer. "The rule that the transfer of chattels must be governed by the law of the country where the transfer takes place applies to a bill or cheque."⁷³

Criminal law.—Forgery of a bank-note is punishable with penal servitude for life, and forgery of any other bill or note with fourteen years' penal servitude: s. 2 of the Forgery Act, 1918 (8 & 4 Geo. 5, c. 27); for definition of forgery, see s. 1 of that Act,⁷⁴ as extended by s. 85 of the Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86).

Procurator signatures.

25. A signature by procurator operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.⁷⁵

ILLUSTRATIONS

1. B, who carries on business for himself, and is also in partnership with S, goes abroad; he gives S an authority to accept bills in his name in respect of his private

⁷¹ *Dawson v. Prince* (1858), 27 L. J. Ch. 169, L.J.J.

⁷² *Esdaile v. La Nauze* (1835), 1 Y. & C. 394; 160 E. R.; Seton on Decrees, 7th ed., p. 712.

⁷³ *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. at p. 683, C. A., per Vaughan Williams, L.J.

⁷⁴ *Cl. R. v. Holden*, [1912] 1 K. B. 483, discussed *Morison v. London County and Westminster Bank*, [1914] 3 K. B. at p. 881, C. A. (partner signing firm name without authority); *R. v. Rogers* (1838), 8 C. & P. 629 (John Smith signing as "John Smith & Co.", there being no such firm).

⁷⁵ New York Negotiable Instruments Law, § 40; cf. *Peget on Banking*, 4th ed., p. 250, as to collecting bankers.

business. S accepts a bill in B's name in respect of the partnership business, signing it "per pro." The bill is negotiated. B is not liable on this acceptance.⁷⁶

2. By a resolution of the directors, the chairman of a company is authorised to accept bills drawn by A against the deposit of securities. He accepts a bill drawn by A, signing per pro. the company, without requiring the deposit of security. The bill is negotiated to a bona fide holder. The company is liable.⁷⁷

3. A cheque payable to order is indorsed "per pro." without the authority of the payee. If the bankers pay it, the payment is protected by statute, and is valid.⁷⁸

4. The manager in South America of an English limited company, in order to obtain a guarantee for the company's business, gives a note signed "for myself and in representation of the company." This not being necessary, or in the ordinary course of the company's business, the company is not liable.⁷⁹

5. Detinue for a Government of India note payable to order. The note was payable to the plaintiff's order, and was indorsed in the form "D, by his attorney, X", in pledge for a private debt of the agent's, though this was not known to the indorsee. The right of the indorsee to retain the note depends on the proper construction of the power of attorney held by X, and in construing it, it will be held that a power to sell does not include a power to pledge.⁸⁰

6. A clerk is authorised to draw cheques "per pro." for his employer's business. He draws a cheque per pro. his employer, making it payable to a bookmaker for his private betting losses. The bookmaker gets the cheque cashed. The employer can recover the money from the bookmaker.⁸¹

7. A manager draws a cheque on his employer's bank "per pro." in excess of his authority. The employer is not liable on this cheque to a person who has cashed it in good faith; but he would have to account for any money which comes into his possession or which is paid away by the manager for his benefit, e.g., paying wages.⁸²

This section is declaratory. It relates only to liabilities on the instrument itself, and does not apply to the proceeds of a bill which has been paid or discharged. It cannot, therefore, be read into s. 82, which protects a banker collecting crossed cheques.⁸³

In *Attwood v. Munnings*,⁸⁴ Bayley, J., says: "This was an action

⁷⁶ *Attwood v. Munnings* (1827), 7 B. & C. 278; 108 E. R.; *Stagg v. Elliott* (1862), 12 C. B. (N.S.) 378; 31 L. J. C. P. 260. Cf. *Jacobs v. Morris*, [1902] 1 Ch. 816, C. A., as to restraining negotiation of bill accepted by agent in excess of his authority.

⁷⁷ *Re Land Credit Co.* (1869), L. R. 4 Ch. 460; cf. *Ex p. Meredith* (1863), 32 L. J. Ch. 800; *Jacobs v. Morris*, [1902] 1 Ch. 816 (construction of power). See p. 78.

⁷⁸ *Charles v. Blackwell* (1877), 2 C. P. D. at pp. 150, 160, C. A., decided on 16 & 17 Vict. c. 59, s. 19. See, now, s. 60. The cheque was signed "C. & Co. per S. K. agent", but it was assumed in the judgments that this was the equivalent of "per pro." signature.

⁷⁹ *Re Cunningham & Co., Ltd.* (1887), 36 Ch. D. 592.

⁸⁰ *Jonmenjoy v. Watson* (1884), 9 App. Cas. 561, P. C., distinguishing *Bank of Bengal v. Macleod* (1852), 7 Moore P. C. 35; 18 E. R.; cf. *Bryant v. Banque du Peuple*, [1898] A. C. 170, P. C. If the agent is acting within his authority, the fact that he has abused it does not affect a holder without notice. As to action for conversion when agent has indorsed "per pro." in fraud of his authority, see *Gompertz v. Cook* (1908), 20 T. L. R. 106.

⁸¹ *Morison v. Kemp* (1912), 29 T. L. R. 70. Cf. *Reckitt v. Barnett, Pembroke and Slater* (1928), 98 L. J. K. B. 196 (power of attorney); following *John and Others v. Dodwell & Co.*, [1918] A. C. 563; *Reckitt v. Numburnholme* (1929), 45 T. L. R. 629; *Midland Bank v. Reckitt*, [1933] A. C. 1.

⁸² *Reid v. Rigby*, [1894] 2 Q. B. 40.

⁸³ *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, C. A.; cf. *Charles v. Blackwell* (1877), 2 C. P. D. 151, C. A. (paying banker).

⁸⁴ 7 B. & C. 278, at p. 288; 108 E. R.

on an acceptance importing to be by procuration, and therefore any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act for him in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, and it would be only reasonable prudence to require the production of that authority."

If Smith & Co. give their manager, John Brown, authority to sign for them "per pro.", the usual form of signature is "p.p. Smith & Co., John Brown".

There is, perhaps, a disposition to narrow the rule in the case of corporations,⁸⁵ since a corporation can only sign by its agents.

In an Irish case⁸⁶ a distinction was drawn between an acceptance signed "p.p. J. B., T. S.", and one signed "For J. B., T. S." The distinction does not seem founded on any clear principle. The case can be supported on other grounds.

Liability of agent signing without authority.—A person who, without authority, signs the name of another person to a bill, either simply or by a procuration signature, is not liable on the instrument—except (1) in the special case provided for by s. 98 of the Companies Act, 1929, p. 860; (2) if the alleged principal be a fictitious or non-existing person.⁸⁷ Thus:—

1. A bill drawn on B is held by C. X, without authority, accepts it for B, signing per pro. X is not liable as acceptor, though he will be liable to C or a subsequent holder in an action for a false representation or breach of warranty of authority, either express or implied, from the very fact of signing without authority.⁸⁸

2. Two directors of a limited company, which has no power to accept bills, accept a bill "per pro." the company. They may be personally liable in an action for false representations.⁸⁹

In such an action for false representations the holder must prove damage.⁹⁰ Since *Derry v. Peek* (1889), the tendency has been to restrict liability *ex delicto* to cases of intentional fraud unless a collateral undertaking can be wrung out of the facts. To sign the name of another person to a bill "per pro." without authority and

⁸⁵ *Re Land Credit Co.* (1869), 1 L. R. 1 Ch. 460, 468. See p. 861, note.

⁸⁶ *O'Reilly v. Richardson* (1865), 17 Ir. Com. L. R. 74; but cf. *Balfour v. Ernest* (1869), 28 L. J. C. P. at p. 170; *Ulster Bank v. Synnott* (1871), 6 Ir. R. Ch. at p. 619; *Employers' Liability Assn. v. Skipper* (1887), 4 T. L. R. 55.

⁸⁷ *Polhill v. Walter* (1882), 8 B. & Ad. 114; 110 E. R. Cf. *Kolner v. Barter* (1866), L. R. 2 C. P. 174; and see s. 28 (1).

⁸⁸ *Polhill v. Walter* (1882), 8 B. & Ad. 114; 110 E. R. He is also liable as impliedly warranting his authority. See *Starkey v. Bank of England*, [1908] A. C. 114, H. L. and cf. *Gowers & Others v. Lloyds Nat. Prov. Foreign Bank, Ltd.*, [1938] 1 A. E. R. 766, C. A.

⁸⁹ *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 860, C. A., see at p. 862.

⁹⁰ *Eastwood v. Bain* (1866), 8 H. & N. 788; 28 L. J. Ex. 74; 157 E. R.

with intent to defraud is no forgery at common law, but it has been made felony by statute.⁹¹ However, if there is authority so to sign, a fraudulent misuse of that authority does not, it seems, amount to forgery.⁹²

Persons signing as agent or in representative capacity.

26. (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.⁹³

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

ILLUSTRATIONS

1. Money is lent to a parish. The churchwardens give a note for the amount, signing it "J. B. and H. S., churchwardens". They are personally liable on the note as makers.⁹⁴

2. B by will directs his executor to carry on his business. The executor does so, and, in the course of the business, accepts bills, signing them "J. S., executor of B". He is personally liable on these acceptances.⁹⁵

3. D, the holder of a bill payable to his order, died. X, his executor, indorsed the bill away, signing the indorsement "J. X., executor of D". X was personally liable on this indorsement, in the absence of such words as "without recourse against me personally".⁹⁶ It would seem that sub-s. (2) of s. 26 now establishes the contrary ruling in such a case.

4. Money is lent to the X Company. A note for the amount is given in the form, "We promise to pay, *et cetera*." (Signed),

"J. B.,
"J. S., } Directors of the X Company, Limited.
"J. T., Manager."

The persons who sign are personally liable as makers.⁹⁷

5. Money is lent to the X Railway Company. A note for the amount is given in the form, "I promise to pay, *et cetera*." (Signed), "for the X Railway Co. J. B., Secretary." J. B. is not personally liable.⁹⁸

6. Note in the form, "We, the directors of the X Company, Limited, *et cetera*." (signed by the directors), "J. B., J. S." In the corner of the note is the seal of

⁹¹ The Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 24. See now s. 1 of the Forgery Act, 1913 (8 & 4 Geo. 5, c. 27).

⁹² *Morison v. London County and Westminster Bank*, [1914] 3 K. B. at p. 380, C. A.

⁹³ See a somewhat different rule laid down by § 80 of the New York Negotiable Instruments Law.

⁹⁴ *Rew v. Pettit* (1894), 1 A. & E. 196; 110 E. R.

⁹⁵ *Liverpool Bank v. Walker* (1869), 4 De G. & J. 24; 45 E. R.

⁹⁶ *Cf. Childs v. Mouins* (1821), 2 Brod. & B. 460; 129 E. R.

⁹⁷ *Courtauld v. Sanders* (1867), 16 L. T. (N.S.) 562.

⁹⁸ *Alexander v. Sizer* (1869), L. R. 4 Ex. 102; but see *Gray v. Raper* (1866), L. R. 1 C. P. 694.

the company, and the signature of an attesting witness. J. B. and J. S. are personally liable.⁹⁹

7. Bill specially indorsed to "C, agent". He indorses it away, signing "C, agent". C is personally liable as indorser.¹

8. A note running "We, the undersigned, in the name and on behalf of the Reformed Presbyterian Church, Stranraer, promise to pay", is signed by three persons. They are personally liable on this note.²

9. Promissory note given for £300 lent to a limited company, and signed, "J. S., managing director". Above his signature is stamped the name of the company, namely, "The J. S. Laundry, Ltd." This is the note of the company, and J. S. is not personally liable.³

10. Bill drawn on a company, and accepted by two directors. The drawer informed the company that he should require the bill to be indorsed by the directors as well as accepted by the company. The same two directors indorsed the bill, signing it "B. Company, Ltd., J. S. and K. D., directors". The directors so signing are personally liable.⁴

11. An acceptance to an unsigned order "pay to our order", was by rubber stamp "D. M. & Co.", with the signature "D. M." and "Managing Director" written below it. On the back of the order appeared D. M.'s signature only. This cannot be construed as indorsement by D. M. & Co.; s. 26 (2) has no application to such a case.⁵

This section was re-drafted in committee, and perhaps somewhat modifies the rigour of the common law rule. At any rate, the older cases must be examined carefully with the words of the section. The principle is this; the terms agent, manager, etc., attached to a signature are regarded as mere *designatio personæ*. The rule is applied with peculiar strictness to bills, because of the non-liability of the principal. "Is it not a universal rule", says Lord Ellenborough, "that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe' he is liable."⁶ Cf. s. 23. It is often difficult to determine whether a given signature is the signature of the principal by the hand of an agent, or the signature of the agent naming a principal. The maxim *ut res magis valeat* governs the construction. As to liability of agent signing his principal's name without authority, see note to last section.⁷ By s. 81 (5), a representative who is compelled to indorse may indorse in such terms as to negative personal liability.

Executors, etc.—The case of an executor or administrator often

⁹⁹ *Dutton v. Marsh* (1871), L. R. 6 Q. B. 361; *Landes v. Bradwell* (1909), 25 T. L. R. 478; *Brehner v. Henderson* (1925), S. O. 643, Court of Session.

¹ *Bartlett v. Hawley* (1876), 120 Mass. 92.

² *M'Meekin v. Easton* (1889), 16 Rettie 368.

³ *Chapman v. Smethurst*, [1909] 1 K. B. 927, C. A. Followed, *Kettle v. Dunster and Wakefield* (1927), 43 T. L. R. 770.

⁴ *Elliott v. Bar-Ironside*, [1925] 2 K. B. 801, C. A. Followed, *Kettle v. Dunster and Wakefield* (1927), 43 T. L. R. 770.

⁵ *Britannia Electric Lamp, etc. v. D. Mandler & Co., Ltd.*, [1939] 2 A. E. R. 469.

⁶ *Leadbitter v. Farrow* (1816), 5 M. & S. at p. 849; 105 E. R.

⁷ Apart from any question of fraud, he impliedly warrants his authority, *Starkey v. Bank of England*, [1908] A. C. 114, H. L.

gives rise to difficulty. Where an executor merely winds up a transaction commenced by the testator, it is right that he should be able to protect himself from personal liability, but where he carries on the business and engages in fresh transactions, it is clear that the fact that he is an executor will not enable him to carry it on as a limited liability concern.

Master of ship.—The master of a ship who draws a bill on his owners for the price of necessaries supplied to the ship is personally liable on the bill, although he states in the bill that it is “for value received in coal . . . for which I hold my vessel owners and freight responsible”.^s

^s *The Elmville*, [1904] P. 319. And see the ordinary course of business in drawing for necessaries described, *The Ripon City*, [1897] P. 225, at p. 231. By special course of dealing the master may be authorised to bind his employer by bill: *Pocahontas Fuel Co. v. Ambatielos* (1922), 27 Com. Cas. 148. The price of necessaries supplied to a ship can also be recovered by an action *in rem* against the ship: *The Mogileff*, [1921] P. 296.

The Consideration for a Bill

Value defined.

27. (1) Valuable consideration for a bill may be constituted by,—

(a) Any consideration sufficient to support a simple contract⁹;

See p. 88 for the distinction between a discounter and a pledgee.

ILLUSTRATIONS

1. A cross acceptance,¹⁰ the forbearance of the debt of a third person,¹¹ the compromise of a disputed liability,¹² a promise to give up a bill thought to be invalid,¹³ a debt barred by the Statute of Limitations,¹⁴ the duty on the part of a thief to restore stolen property,¹⁵ or the withdrawal of a letter to a club committee complaining that acceptor has not paid a gaming debt,¹⁶ or the payment of a deposit under the terms of an oral and unenforceable agreement to buy a cottage,¹⁷ constitute value.

2. A mere moral obligation,¹⁸ a debt represented to be due though not really

⁹ As to consideration in law generally, see notes to *Lampleigh v. Braithwaite*, 1 Smith L. C., 18th ed., p. 148. Consideration need not be adequate, cf. *Adib el Hinnawi v. Yacoub Palani*, [1936] E. A. E. R. 698.

¹⁰ *Rose v. Sims* (1890), 1 B. & Ad. at p. 526; cf. *Burdon v. Benton* (1847), 9 Q. B. 843; *Hornblower v. Proud* (1819), 2 B. & Ald. 927; 106 E. R.; *Rice v. Grange* (1892), 131 New York R. 149 (exchange of promissory notes). As to proof on cross-acceptances, see *Ex p. Camd* (1874), L. R. 9 Ch. 687, and Williams' Bankruptcy, 18th ed., pp. 163, 164.

¹¹ *Balfour v. Sea Assur. Co.* (1857), 8 C. B. (n.s.) 800; 27 L. J. C. P. 17; 140 E. R.; cf. *Crears v. Hunter* (1887), 19 Q. B. D. 841, C. A. (forbearance in fact, without binding agreement to forbear); cf. *Elkington v. Cooke Hill* (1914), 80 T. L. R. 670 (forbearance to enforce note pending currency of post-dated cheque).

¹² *Cook v. Wright* (1861), 80 L. J. Q. B. 321.

¹³ *Smith v. Smith* (1888), 18 C. B. (n.s.) 418; 32 L. J. C. P. 149; 143 E. R.

¹⁴ *Latouche v. Latouche* (1865), 3 H. & C. at p. 576; 34 L. J. Ex. 85; cf. *Wild v. Tucker*, [1914] 3 K. B. 36 (debt provable in bankruptcy).

¹⁵ *London and County Bank v. River Plate Bank* (1888), 21 Q. B. D. 535, C. A.; cf. *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280, at p. 297 (convention of other securities).

¹⁶ *Ex p. Martingell, re Browne*, [1904] 2 K. B. 139; cf. *Hyams v. Stuart King*, [1908] 2 K. B. 696, C. A., with *Poteliakhoff v. Teakle*, [1939] 3 A. E. R. 686. See p. 102, n. 64.

¹⁷ *Low v. Fry* (1935), 152 L. T. 585 (action by the prospective vendor (who was quite willing to go through with the bargain) on a cheque given by the prospective purchaser who wished to recede from the arrangement and had stopped the cheque).

¹⁸ *Eastwood v. Kanyon* (1840), 11 A. & E. 498; 118 E. R.; cf. *Flight v. Reed* (1868), 32 L. J. Ex. 265; cf. *White v. Bluett* (1859), 28 L. J. Ex. 86, as to attempting to discharge a note for a loan by a promise which was *nudum pactum*; *Re Whitaker* (1880), 42 Ch. D. 119, C. A. (proof against lunatic's estate on voluntary note).

due,¹⁹ the surrender of a void note,²⁰ a voluntary gift of money,²¹ and a promise not to bring an action on a gaming debtor,²² do not constitute valuable considerations.

(b) An antecedent debt²³ or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.²⁴

ILLUSTRATION

A customer, being indebted to his bankers, gets a cheque on another bank from a friend, for the purpose of reducing his overdraft. The cheque is paid in and credited to his account. The bankers hold that cheque for value, and can recover from the drawer if he stops it.²⁵

The words "or liability" were added in committee. They perhaps extended the previous law. By s. 2, "value" means valuable consideration, *i.e.*, as defined by this section.

Valuable consideration has been defined as "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other".²⁶

This section, it seems, does not affect the principle of Scottish law "that valuable consideration is not necessary to support an obligation. But want of value (non-onerosity) may be pleaded in evidence when a bill is challenged on other grounds, as for illegality, fraud, or failure of the consideration".²⁷

¹⁹ *Southall v. Rigg* (1851), 11 C. B. 481; 138 E. R.; *sed quære*; the compromise of an honestly-made claim is a good consideration, and it makes no difference that the claim turns out to be groundless in law or fact: *Holsworthy U. D. C. v. Holsworthy R. D. C.*, [1907] 2 Ch. 62; *Miles v. N. Z. Alford Estate Co.* (1885), 32 Ch. D. 266; and *Callisher v. Bischoffsheim* (1870), L. R. 5 Q. B. 449. And in *Stott v. Fairland* (1883), 52 L. J. Q. B. 420, Denman, J., seems to have held an agreement to pay a debt within three years is no consideration for giving a note payable on demand; this does not seem supportable to-day. See, too, *Bell v. Gardiner* (1842), 4 M. & Gr. 11; 134 E. R., note given in satisfaction of bill not known to have been altered. The renewal of note made without consideration stands on the same footing as the original: *Edwards v. Chancellor* (1888), 52 J. P. 464. In *Ayres v. Moore*, [1940] 1 K. B. 278, an antecedent debt without any express or implied forbearance to sue was held valuable consideration, the bill in consideration therefor being a conditional discharge of the antecedent liability.

²⁰ *Coward v. Hughes* (1855), 1 K. & J. 443; 69 E. R.; but cf. *Mather v. Maidstone* (1856), 38 C. B. 273; 25 L. J. C. P. 310, where an estoppel intervened.

²¹ *Hill v. Wilson* (1878), L. R. 8 Ch. at p. 894.

²² *Poteliakhoff v. Teakle*, [1888] 3 A. E. R. 686; see further, *Norreys v. Zeffert*, [1889] 2 A. E. R. 187.

²³ *Poirier v. Morris* (1853), 2 E. & B. 69; 121 E. R.; *Swift v. Tyson* (1842), 15 Pet. 1 Sup. Ct. U. S., Story, J.; cf. *Butcher v. Stead* (1875), L. R. 7 H. L. 889; New York Negotiable Instruments Law, § 51. *Ayres v. Moore*, [1940] 1 K. B. 278.

²⁴ *Currie v. Misa* (1875), L. R. 10 Ex. 153, Ex. Ch.; approved *Fleming v. Bank of New Zealand*, [1900] A. C. 577, at p. 588, P. C. (deposit of store warrant by plaintiff's agent).

²⁵ *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95.

²⁶ *Currie v. Misa* (1875), L. R. 10 Ex. at p. 162, *per* Lush, J.; and cf. *Carhill v. Carbolic Co.*, [1893] 1 Q. B. at pp. 271, 272, *per* Bowen, L.J.

²⁷ *Bell's Princ.* (9th ed.), § 333 b. See also Gloag's Intro. to the Law of Scotland (8rd ed.), p. 294, and *Law v. Humphrey* (1876), 3 R. 1192.

Until 1875 it was uncertain how far an antecedent debt constituted a sufficient consideration for an instrument payable on demand. In the case of a bill or note payable *in futuro* it was said that the suspension of the creditor's remedies during the currency of the instrument constituted value; but that when the instrument was payable on demand there was no such giving of time; in *Currie v. Misa*,²⁸ the Court pointed out in this regard that there is no valid distinction between a bill payable *in futuro* and one payable on demand. In either case the instrument operates as conditional payment of the past debt—that is to say, it is payment of the debt unless and until the bill is dishonoured. Except where there is a lien by implication of law, in order that a past debt may constitute value the bill or note must, of course, be given in respect of the debt.²⁹ In *Ex p. Richdale*,³⁰ the payee of a post-dated cheque paid it into his bankers, who credited it to his account. The payee failed, and it was held that his trustee could not recover the amount from the drawer, on the broad ground that as soon as the payee's account was credited with the amount of the cheque the bankers became holders for value, whether his account was overdrawn or not. Where bankers collect bills or cheques for customers, it seems to be a question of fact in each case whether they hold the proceeds *qua* bankers, i.e., debtors, or as trustees for their customer, the presumption being that they are debtors.³¹

Adequacy of value.—The Courts do not inquire into the adequacy of a *bona fide* consideration.³² This was always the law as regards considerations other than money, but when the consideration was money the usury laws formerly created a difficulty. This has now been removed.³³ But inadequacy of consideration may be evidence of bad faith or fraud.³⁴ Again, inadequacy of consideration must be distinguished from partial absence of consideration, partial failure

²⁸ *Currie v. Misa* (1875), L. R. 10 Ex. 153, Ex. Ch.; approved *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95; cf. *Marreco v. Richardson*, [1908] 2 K. B. at p. 592, C. A.

²⁹ Cf. *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208; 109 E. R., as explained in *Currie v. Misa*, L. R. 10 Ex. at p. 164, and *M'Lean v. Clydesdale Bank*, 9 App. Cas. at p. 114.

³⁰ *Ex p. Richdale* (1882), 19 Ch. D. 409, C. A.; approved *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. at p. 718, C. A.; and cf. *National Bank v. Saks*, [1891] 1 Q. B. at p. 489; *Capital and Counties Bank v. Gordon*, [1908] A. C. 240, at p. 245, H. L.

³¹ Cf. *Re Commercial Bank of South Australia*, [1897] W. N. p. 44; *Ex p. Plitt, Re Brown* (1889), 6 Morrell 81; *Gordon v. London and Midland Bank*, [1909] 1 K. B. 242, C. A.; affirmed, [1903] A. C. 240, H. L.; and see notes to s. 88.

³² *Jones v. Gordon* (1887), 2 App. Cas. 618, H. L.; *Earl v. Peck* (1876), 64 New York R. 596; *Adib el Hinnawi v. Yacoub Falimi*, [1936] 1 A. E. R. 638. As to an illusory consideration, e.g., delay of one day, see *Young v. Gordon* (1896), 23 Ct. of Sess. Cas. 419.

³³ *Jones v. Gordon*, *supra*, per Lord Blackburn, at p. 622.

³⁴ *Ibid.*; cf. *Allen v. Davis* (1850), 20 L. J. Ch. 44; *Simon v. Cridland* (1862), 5 L. T. (N.S.) 524.

of consideration, part payment on account,¹⁵ or a mere advance made on a bill which is pledged or deposited as security.

Unconscionable Bargains.—Although the adequacy of the value given will not be inquired into where parties contract on an equality, the Court in the exercise of its equitable powers will grant relief, as between immediate parties, either with or without terms, when an unfair advantage has been taken of a person's position, though there may be nothing amounting to positive fraud, e.g., in case of a catching bargain with an expectant heir or reversioner,¹⁶ or (formerly) where a woman has been induced to give an accommodation acceptance without independent advice.¹⁷

Moneylenders.—As to harsh and unconscionable dealings between moneylenders and borrowers, see s. 1 of the Moneylenders Act, 1900 (68 & 64 Vict. c. 51). This enactment enables the Court to give relief if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges, and extends the old powers of the Courts of Equity.¹⁸ The Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), imposes stringent obligations on the moneylender in such matters as the name in which he trades (ss. 1 and 2) and the form in which a contract between him and a borrower may be made (s. 6). *Bona fide* assignees and holders for value of moneylending securities (not being themselves moneylenders) are protected; but wherever a borrower or any other person is thereby prejudiced, the moneylender is liable to indemnify him (s. 17 (1) (a)). S. 1 of the repealed Moneylenders Act, 1911, remains in force as regards agreements with

¹⁵ *Dresser v. Missouri Co* (1876), 9 Otto 92, Sup. Ct. U. S.

¹⁶ *Aylesford v. Morris* (1873), L. R. 8 Ch. 484; *Nevill v. Snelling* (1880), 15 Ch. D. 679.

¹⁷ *Maitland v. Backhouse* (1847), 16 Sim. 58; 60 E. R.; *Kempson v. Ashbee* (1874), L. R. 10 Ch. 15. Query, effect of the Married Women's Property Acts. And see p. 61.

¹⁸ *Re A Debtor*, [1908] 1 K. B. 705, C. A.; *Samuel v. Newbold*, [1906] A. C. 461, H. L.; *Sterling v. Rose* (1913), 30 T. L. R. 67; *Kerman v. Wainwright*, [1916] W. N. p. 85 (excessive interest, power to open up closed transaction); as to misdescription of moneylender in promissory note, see *Peizer v. Lefkowitz*, [1912] 2 K. B. 235, C. A.; *Kruse v. Sealey*, [1924] 1 Ch. 136 (excessive interest when security had been given); *Stirling v. John*, [1921] 1 K. B. 557, C. A. (cheque payable to moneylender's agent); *Vorst v. Goldstein*, [1924] 2 K. B. 372 (money lent in his own, and not in partnership name); *Mertz and others v. South Wales Equitable Money Society* (1927), 96 L. J. K. B. 1020 (promissory note void because taken in name of the secretary, i.e., otherwise than in the registered name of a moneylending company); *Temperance Loan v. Rose*, [1932] 2 K. B. 522; *Lancashire Loans v. Black*, [1934] 1 K. B. 880; *Lyle v. Chappell*, [1932] 1 K. B. 671; *Cohen v. J. Lester*, [1938] 4 A. E. R. 187 (securities ordered to be returned without putting the borrower on terms); *Re a Debtor*, [1938] 2 A. E. R. 769 (inaccurate and fatal to describe a loan secured by two notes of £50 as secured by one note of £100); *B. S. Lyle v. Pearson and another*, [1941] 3 A. E. R. 128 (a series of notes and transactions ending in one note will be opened up and not merely the current consolidating transaction and note); *Mills Conduit v. Tattersall*, [1940] 1 A. E. R. 281; *Central Advance v. Marshall*, [1939] 3 A. E. R. 695.

and securities taken by a moneylender before the commencement of the Act of 1927 (s. 19 (8)).

Holder for value.

(2) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.⁴⁰

ILLUSTRATIONS

1. B owes C £50. In order to pay C, A at B's request draws a bill on B for £50 in favour of C. C is a holder for value and can sue A, though A has received no value.⁴¹

2. A draws a bill on B payable to his own order. B, to accommodate A, accepts it. Subsequently A gives value to B. A is a holder for value.⁴²

3. B makes a note in favour of C. C is the treasurer of a loan society, and the consideration for the note is money advanced by the society to B. C is a holder for value.⁴³

4. C, the holder of a bill, indorses it in blank to D, receiving no value. D for value transfers it by delivery to E. E is a holder for value.⁴⁴

5. A, at the request of X, draws a bill payable to C for X's account with C. X remits the bill to C. C is a holder for value. It is immaterial that there is no consideration between A and X, or that the consideration fails.⁴⁵

6. S, in the West Indies, is indebted to C in Paris. In order to pay him, S remits money to X, his correspondent in London, who thereupon obtains a bill for the amount, drawn by A upon Paris, payable to C's order. X remits the bill to C, but fails before he pays A for it. S subsequently pays C. C is a holder for value, and can sue A.⁴⁶

In Illustration 6, C would be trustee for S: see "holder" defined by s. 2, and "holder in due course" by s. 29. As to the holder's rights as such, see s. 38. In the Scottish cases a holder for value is termed an "onerous holder".

Sale of Bill.—In legal language a bill is said to be sold when it is transferred by delivery without indorsement.⁴⁷ Not so in mercantile language. Suppose Smith in London wishes to pay 1,000 rupees to Brown in India. Smith goes to Jones, who has a correspondent in Calcutta, and gets him to draw a bill on Calcutta for 1,000 rupees. Usually the bill is drawn payable to Brown, but sometimes it is drawn payable to Smith, who then indorses it to Brown. The amount paid by Smith to Jones for this bill depends on the rate of exchange

³⁹ *Hunter v. Wilson* (1849), 4 Exch. 489; 154 E. R.; New York Negotiable Instruments Law, § 52.

⁴⁰ *Scott v. Lifford* (1808), 1 Camp. 246; 170 E. R.

⁴¹ *Burdon v. Benton* (1847), 9 Q. B. 843; 115 E. R.

⁴² *Lomas v. Bradshaw* (1850), 19 L. J. C. P. 278.

⁴³ *Barber v. Richards* (1861), 6 Exch. 68; 155 E. R.

⁴⁴ *Munroe v. Bordier* (1849), 8 C. R. 862; 137 E. R. But he is not a holder in due course if there has been fraud: see *Jones v. Waring & Gillow*, [1926] A. C. 670, 680, H. L., distinguishing and explaining *Watson v. Russell* (1864), 5 B. & S. 968, Ex. Ch.; 122 E. R.

⁴⁵ *Fairier v. Morris* (1858), 2 E. & B. 89; 118 E. R.

⁴⁶ See p. 190, and *Daniel*, § 733 a.

between London and Calcutta on the day of the transaction. In some trades the custom is for Smith to pay Jones when he gets the bill; in other trades it is the custom not to pay till the next mail day. Such a transaction is called a sale of the bill by Jones to Smith. Smith, the buyer, who sends the bill out to India, is called the "remitter".⁴⁷ As to fixing the rate of exchange at which a bill is to be sold, see note to s. 9. The conditions regulating the rate of exchange between two countries, and the mode in which those conditions are taken advantage of, are fully discussed in *Goschen's Foreign Exchanges*. A judgment of Wood, V.-C., explains the practice of paying for bills partly by cash, partly by bankers' "marginal notes" or "marginal receipts".⁴⁸

A holder for value may or may not be a holder in due course.⁴⁹ The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it, see s. 29 (8).

Holder having a lien.

(3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.⁵⁰

ILLUSTRATIONS

1. D holds a bill indorsed in blank as agent for C: D wrongfully pledges it with E. E is a holder for value to the extent of the sum he advanced, and if he took the bill without notice of the fraud, he can retain the bill as against C, the true owner.⁵¹

2. C, the holder of a bill for £100, deposits it with D as security for a running account. At the time the bill matures the balance is in C's favour, but subsequently the balance turns against him to the extent of £50. D is a holder for value as to £50.⁵²

3. C, the holder of a bill for £100, indorses it to D as a pledge for £50. D is a holder for value as to £50, and this is the sum he can recover if he sues C.⁵³

4. C keeps with his bankers a loan account and a general account. C indorses to the bank, as collateral security for his loan account, a bill for £1,000, and draws against it to the extent of £500. C becomes bankrupt, and his general account is overdrawn more than £500. The bank are holders of the bill for full value.⁵⁴

⁴⁷ Cf. *Comber v. Leyland*, [1898] A. C. at pp. 530, 581. See, *The Orterio*, [1920] A. C. 724, 733, P. C. (sale of enemy bill to neutral during war).

⁴⁸ *Jeffryes v. Agra Bank* (1866), L. R. 2 Eq. 676; cf. *Ex p. Kemp* (1874), L. R. 9 Ch. 383.

⁴⁹ *Raphael v. Bank of England* (1855), 17 C. B. (n.s.) at p. 174; 144 E. R.; cf. s. 29; and *Partridge v. Bank of England* (1846), 9 Q. B. at p. 420, Ex. Ch.; *Jones v. Waring & Gillow*, [1926] A. C. 870.

⁵⁰ New York Negotiable Instruments Law, § 53; *Paget on Banking*, 2nd ed., p. 305. As to consideration generally, and the rules for its impeachment, see pp. 97-105.

⁵¹ *Collins v. Martin* (1797), 1 B. & P. 648; 126 E. R.

⁵² *Atwood v. Crowdie* (1818), 1 Stark. 488; 171 E. R.; cf. *Pease v. Hirst* (1829), 10 B. & C. 122; *Gray v. Seckham* (1872), L. R. 7 Ch. at p. 683.

⁵³ *Attenborough v. Clarke* (1858), 27 L. J. Ex. 138.

⁵⁴ *Re European Bank* (1872) L. R. 8 Ch. 41.

5. The drawer of a bill for £100, which has been accepted for his accommodation, indorses it to C as a security for £50. If the acceptor becomes bankrupt, C can tender a proof for £100, but can only receive dividends to the extent of £50.⁵⁵

6. A bill indorsed by a customer to his banker and entered "short", remains the property of the customer, though the banker may have a lien on it.⁵⁶

The "discount" of a bill must be distinguished from the pledge or deposit of a bill as security.⁵⁷ A "discount" is a holder for full value.⁵⁸ Treasury bills furnish a good example of a discount transaction. They bear no interest, but are offered on the money market at a fixed rate of discount. The position of a pledgee is this: If he sue a third party, he sues as trustee for the pledgor, as regards the difference between the amount he has advanced and the amount of the bill.⁵⁹ If the pledgor could have sued on the bill, the pledgee can recover the whole. If the title of the pledgor is defective, the pledgee can recover the amount of his advance, provided he took the bill without notice. Like any other bailee, the pledgee of a bill must use due diligence with reference to it, having regard to the peculiar nature of the thing bailed, *e.g.*, he must not part with it; he must if he can collect it at maturity; if he cannot, he must give the proper notices of dishonour.⁶⁰

Banker's Lien.—A banker's lien on negotiable securities has been judicially defined as "an implied pledge".⁶¹ A banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer⁶²; if he knows that

⁵⁵ *Ex p. Newton* (1880), 16 Ch. D. 380, C. A.

⁵⁶ *Thompson v. Giles* (1824), 2 B. & C. 422; 107 E. R.; distinguished *Ex p. Stannard* (1893), 10 Morrell 193, 912 (cheques).

⁵⁷ *Ex p. Towgood* (1812), 19 Ves. 229; *Re Gomersall* (1875), 1 Ch. D. at p. 142; *Ex p. Schofield* (1879), 12 Ch. D. 387, C. A., bills indorsed "pending discount".

⁵⁸ *Ibid.*; cf. *Thiedman v. Goldsmidt* (1859), 1 De G. F. & J. at p. 11; 145 E. R. The term "discount" is somewhat loosely used. It properly applies to the party who buys, and not to the party who sells, the bill. As to the operations of the discount market, see Spalding's *Foreign Exchange and Foreign Bills*, Chapter XX.

⁵⁹ *Reid v. Furnival* (1833), 1 Cr. & M. 538; 149 E. R.

⁶⁰ *Frarock v. Pursell* (1863), 32 L. J. C. P. 260.

⁶¹ *Brandao v. Barnett* (1846), 3 C. B. at p. 531; 136 E. R., H. L. A "lien" generally is a mere right to hold a thing till a debt is paid, and is therefore distinct from a pledge, because the pledgee has a special property in the thing pledged; but in the case of a negotiable security the person who has the lien is the holder of the instrument with the corresponding rights and duties, and he therefore has more than the ordinary lien on an ordinary chattel.

⁶² *Brandao v. Barnett*, *supra*; *London Chartered Bank of Australia v. White* (1870), 4 App. Cas. 413, P. C.; *Johnson v. Roberts* (1875), L. R. 10 Ch. 506, where customer was a country bank; *Currie v. Misa* (1876), 1 App. Cas. at p. 569, H. L.; and cf. *Coleman v. Bucks and Oxon Bank*, [1897] 2 Ch. 243, as to application of trust funds to customer's private overdraft; *Baker v. Lloyds Bank*, [1920] 2 K. B. 322, banker's lien when customer has made deed of assignment for creditors.

the bills do not belong to his customer, no lien attaches.⁶³ A broker who deals in bills may have a similar lien.⁶⁴ If a banker releases negotiable securities pledged with him by a bill-broker on receiving the bill-broker's cheque, and the cheque is dishonoured, the securities are not impressed with any trust in favour of the banker.⁶⁵

The terms on which securities are deposited may, of course, create merely a particular lien and not a general lien.⁶⁶

Prima facie, where a bill is negotiated from one person to another it is deemed to have been wholly transferred to the latter, and not to have been pledged or deposited as collateral security.⁶⁷

Accommodation bill or party.

28. (1) An accommodation party to a bill is a person who has signed a bill as a drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.⁶⁸

Liability of accommodation party.

(2) An accommodation party is liable on the bill to a holder for value, and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.⁶⁹

ILLUSTRATIONS

1. Bill accepted for the accommodation of the drawer. This is an accommodation bill, and the acceptor is an accommodation acceptor.⁷⁰

2. Bill drawn, indorsed, and accepted for the accommodation of X, who is not a party thereto. The drawer and acceptor receive a commission for so doing. This is an accommodation bill.⁷¹

3. Bill drawn against a running account, and accepted. This, it seems, is not an accommodation bill, though the account may have been against the drawer when the bill was drawn, or accepted, or payable.⁷²

⁶³ *Ex p. Kingston* (1871), L. R. 6 Ch. 682; cf. *Thomson v. Clydesdale Bank*, [1899] A. C. at p. 289, H. L.

⁶⁴ *Jones v. Peppercorn* (1858), John. 430; 28 L. J. Ch. 158.

⁶⁵ *Lloyds Bank v. Swiss Bankverein* (1913), 18 Com. Cas. 79, C. A. As to the nature of a bill-broker's business, see the judgment of Hamilton, J., in the Court below, 17 Com. Cas. 280, and Spalding's Foreign Exchange and Foreign Bills, p. 199.

⁶⁶ *Re Bowes* (1886), 38 Ch. D. 586.

⁶⁷ *Hills v. Parker* (1866), 14 L. T. (N.S.) 107; *Re Boys* (1870), L. R. 10 Eq. 467; cf. *Attenborough v. Clarke* (1858), 27 L. J. Ex. 138.

⁶⁸ New York Negotiable Instruments Law, § 55, and cases cited in Crawford's edition.

⁶⁹ New York Negotiable Instruments Law, § 55.

⁷⁰ *Collatt v. Haigh* (1812), 3 Camp. 281.

⁷¹ *Oriental Financial Corporation v. Overend* (1871), L. R. 7 Ch. 142.

⁷² *Ex p. Swan* (1868), L. R. 6 Eq. at p. 356; cf. *Wilks v. Hornby* (1862), 10 W. R. 742.

4. Bill drawn payable to the order of C, and accepted. It appears that the acceptor was indebted to C, but that the drawer signed to accommodate the acceptor. This is not an accommodation bill, though the drawer is an accommodation drawer.⁷³

5. Bill payable to drawer's order is accepted for value. C, whose name is well known, indorses the bill to give it currency. This is not an accommodation bill, but C is an accommodation indorser.⁷⁴

Illustrations 4 and 5 emphasise the incorrectness of the statement frequently made that a bill which is signed by one or more accommodation parties is an accommodation bill. An accommodation bill is a bill whereof the acceptor (*i.e.*, the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party thereto.⁷⁵ The distinction is of great importance in relation to the discharge of the bill. An accommodation bill is discharged when it is discharged by the person who is in substance, though not in form, the principal debtor (see *e.g.*, s. 59 (8)) or if time be given to such person.⁷⁶ As a general rule, the drawer or indorser, for whose accommodation a bill is accepted, cannot avail himself of want of due presentment for payment (s. 46 (2)), or notice of dishonour (s. 50 (2)), or protest (s. 51 (9)), because it is his own duty to provide the funds to meet the bill at maturity. As to negotiation of overdue accommodation bill, see note to s. 36 (2).

An accommodation party, known to be such, may avail himself of any defence, arising out of the bill transaction, which the person accommodated could have set up⁷⁷: see "holder for value" defined by s. 27 (2) and (3). *Prima facie* every party to a bill is deemed to have become a party thereto for value: see s. 30.

Finance bills.—The term "finance bill" is somewhat loosely used. It denotes a bill which is issued for the purpose of raising money, and which is not based on any trading transaction. Whether it is an accommodation bill or not depends on the arrangement between drawer and drawee, but normally it is an accommodation bill. The finance bill is largely used in connection with arbitrage transactions.⁷⁸ Strictly, perhaps, the term should be restricted to long bills drawn by the banks and accepting houses of one country on those of another

⁷³ *Scott v. Lifford* (1808), 1 Camp. 246; 170 E. R.; cf. *Sleigh v. Sleigh* (1850), 5 Exch. 514; 155 E. R.

⁷⁴ Cf. *Re Nunn* (1817), Buck. 113. This practice is not uncommon in the case of foreign bills, a small commission being usually charged. See, *e.g.*, *Société Générale v. Metropolitan Bank* (1873), 27 L. T. (N.S.) 849.

⁷⁵ Cf. *Oriental Financial Corporation v. Overend* (1871), L. R. 7 Ch. at pp. 146, 151, and *ibid.*, L. R. 7 H. L. at p. 368; *Ex p. European Bank* (1871), L. R. 7 Ch. 99.

⁷⁶ See last note. And see p. 216, Principal and Surety.

⁷⁷ *Becherovaise v. Lewis* (1872), L. R. 7 C. P. 372, at p. 377.

⁷⁸ *i.e.*, roughly speaking, traffic in bills drawn between two countries conducted through the intermediary of the exchange of another country in order to secure the most advantageous rate of exchange.

for the express purpose of raising money at an opportune moment: see *Spalding's Foreign Exchange and Foreign Bills*, Chap. XIX.

Holder in due course.

29. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

- (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact⁷⁹;
- (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.⁸⁰

ILLUSTRATIONS

1. C, the holder of a bill payable to his order, transfers it to D for value, but without indorsing it. C has obtained this bill by fraud, but D has no notice of this. D is not a holder in due course.⁸¹

2. C, who resides abroad, transmits a bill for collection to his agent in England. C has obtained this bill by fraud, but his agent does not know it. At the time the agent receives the bill, C is indebted to him on the balance of account. The agent is not a holder in due course, and cannot recover on the bill. *Allier*, if the bill had been transmitted to the agent in payment of his debt.⁸²

3. C indorses a bill to D for value. D suspects that C stole the bill. As a fact he obtained it by false pretences. D is not a holder in due course.⁸³

4. The manager of a bank steals negotiable securities from the bank, and pledges them with C. He afterwards obtains them back from C by a fraud, and replaces them in the bank. The bank know nothing of the transactions. The bank is the holder in due course of these securities, and entitled to retain them against C.⁸⁴

5. X, by false pretences, induces A to draw a cheque in favour of C, who takes it in good faith and for value. C, being the original payee, is not a holder in due course.⁸⁵

⁷⁹ See *Hornby v. McLaren* (1908), 24 T. L. R. 494, C. A. (cheque known to have been dishonoured).

⁸⁰ Cf. New York Negotiable Instruments Law, § 91, and cases cited in Crawford's edition; *Lloyds Bank v. Cooke*, [1907] 1 K. B. at p. 808, *per* Moulton, L.J.

⁸¹ *Whistler v. Forster* (1868), 14 C. B. (N.S.) at p. 266; 113 E. R.; 32 L. J. C. P. at p. 168. D is not the "holder" as defined by s. 2.

⁸² *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208, as explained by *Currie v. Misa* (1875), L. R. 10 Ex. at p. 164; and *M'Lean v. Clydesdale Bank* (1882), 9 App. Cas. at p. 114.

⁸³ Cf. *Jones v. Gordon* (1877), 2 App. Cas. at p. 628.

⁸⁴ *London and County Bank v. River Plate Bank* (1888), 21 Q. B. D. 595, C. A.; cf. *London Joint Stock Bank v. Simmons*, [1892] A. C. 201. It is suggested that the illustration may no longer represent the law, having regard to *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716. The question is into which category ought *London & County Bank v. River Plate Bank* to fall—the category instanced in *Lloyds Case* or that illustrated by *Ruben v. Great Fingall, etc.*, [1906] A. C. 439? The arguments seem to be nicely balanced: see *Penmount Estates v. Nat. Prop. Bk.* (1945), 173 L. T. at p. 847. Cf. *Wright, J.*, in *Slingsby v. District Bank*, 146 L. T. at p. 648.

⁸⁵ *Jones v. Waring & Gillow*, [1926] A. C. 670, H. L., approving *Lewis v. Clay* (1897), 67 L. J. Q. B. 224; disapproving *dictum* of Moulton, L.J., in *Lloyds Bank*

6 Bill in ordinary form payable thirty days after sight. It is 'complete and regular', although it has not been accepted.⁸⁶

A post-dated cheque is not irregular within this section.⁸⁷ But an undated bill, though not irregular (or at least not invalid, s. 8 (4) (a)) is presumably not complete.

By s. 2, "holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof; and "bearer" means the person in possession of a bill or note which is payable to bearer: see "value defined by s. 27 (1); and "holder for value" by s. 27 (2) and (8). As to the rights of the "holder" and "holder in due course" respectively, see s. 38. As to "negotiation", see s. 31; and as to overdue or dishonoured bills, see s. 36. As to defects in title, see sub-s. 2.

It had been doubted how far the original payee of a bill or note obtained by the fraud of a third party could be a "holder in due course"⁸⁸; the House of Lords has now decided that he cannot be.⁸⁹

The Act has substituted the positive term "holder in due course" for the cumbrous negative equivalent "*bona fide* holder for value without notice", and its synonyms "*bona fide* holder", "innocent indorsee", etc. The Indian Act (s. 9) has adopted the same term. The French equivalent, "*tiers porteur de bonne foi*", i.e., third party holder in good faith, is expressive.

Notice.—"Notice" means actual, though not formal notice, that is to say, either knowledge of the facts, or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge.⁹⁰

Good faith.—"Good faith" is defined in s. 90. In the United States it seems that if the holder takes a bill in good faith, but gets notice of a defect in the title of his transferor before he has given full value, he is only deemed a holder in due course to the extent he has paid before getting notice.⁹¹

v. *Cooke*, [1907] 1 K. B. 794; criticizing and distinguishing *Watson v. Russell*, (1862), 31 L. J. Q. B. 301; affirmed (1864), 5 B. & F. 968 (Ex Ch.); 122 E. R. *Ayres v. Moore*, [1940] 1 K. B. 278.

⁸⁶ *National Park Bank of New York v. Berggren* (1914), 19 Com. Cas. 234

⁸⁷ *Hitchcock v. Edwards* (1889), 60 L. T. 636; *Guildford Trust v. Goss* (1927), 136 L. T. 725; and see notes to s. 18 (2)

⁸⁸ *Lewis v. Clay* (1897), 14 T. L. R. at p. 150; *Herdman v. Wheeler*, [1902] 1 K. B. 361.

⁸⁹ *Jones v. Waring & Ollow*, [1926] A. C. 670, H. L. See *per Lord Cave* at p. 680, and Illustration 3. Contrast the Indian Negotiable Instruments Act, 1881, s. 9, referred to in *Lloyds Bank v. Chartered Bank of India, Australia and China* (1928), 97 L. J. K. B. 609.

⁹⁰ *Raphael v. Bank of England* (1885), 17 C. B. at p. 174, *per Willes, J.*; cf. *Ex p. Snowball* (1872), L. R. 7 Ch. at p. 549. "A person may be proved to have had notice of an act of bankruptcy either by proof that he had received formal notice, or by proof that he knew facts which were sufficient to inform him that an act of bankruptcy had been committed"; cf. *New York Negotiable Instruments Law*, § 95, defining "notice" as actual knowledge or "knowledge of such facts that his action in taking the instrument amounted to bad faith".

⁹¹ *New York Negotiable Instruments Law*, § 98, and cases in Crawford's edition.

Principal and Agent.—The ordinary rules of law regarding parties affected with notice, apply to bills and notes. Notice to the principal is notice to the agent; and notice to the agent is notice to the principal,⁹² subject to the proviso (1) that when the agent is himself a party to a fraud he is not to be taken to have disclosed it to his principal⁹³; and (2) where a bill is negotiated to an agent, and notice is given to the principal, or *vice versa*, there must be a reasonable time for communication.⁹⁴

Bill must be complete and regular.—The rights of a holder in due course can only be acquired by a person who takes a bill before it is overdue, and which is "complete and regular on the face of it". If the bill itself conveys a warning, *caveat emptor*. Its holder, however honest, can acquire no better title than that of his transferor. The holder takes at his peril⁹⁵ a blank acceptance, or a bill wanting any material particular; so also a bill which has been torn and the pieces pasted together, at least if the tears appear to show an intention to cancel it.⁹⁶ A post-dated cheque is not irregular (*supra*, p. 92).

An American judgment puts the point clearly. Some negotiable county bonds, which had been indorsed in blank by the payee, were stolen. The thief erased the payee's indorsement, personated the payee himself, and sold the bonds to a person who purchased them in perfect good faith. It was held that the purchaser acquired no title, and that the erasure, at any rate, ought to have put him on his guard. In the judgment it is said⁹⁷: "He did not rely upon anything that appeared upon the bonds. He relied on the representations of the thief, and was deceived by them. Against such deception the laws applicable to negotiable paper were not intended to guard. It is their purpose to facilitate the circulation of paper, fair and regular upon its face, and to protect the *bona fide* purchasers of such paper. . . . Suppose the thief should erase the name of the maker of a note, and then forge the same signature, could he give a *bona fide* purchaser for value title to the paper? I am clearly of opinion he could not. The paper is not fair upon its face. There is a forgery, and although the purchaser may be ignorant of it, the law merchant does not protect him against such ignorance. He must know at his peril that the signatures are genuine. We are asked,

⁹² Cf. *Collinson v. Lister* (1855), 7 De G. M. & G. at p. 687; 44 E. R., branch bank.

⁹³ *Ex p. Oriental Bank* (1870), L. R. 5 Ch. 358.

⁹⁴ Cf. *Willis v. Bank of England* (1885), 4 A. & E. at p. 89; 111 E. R.

⁹⁵ *Awde v. Dixon* (1851), 6 Exch. 869; 155 E. R., and cases in note to s. 20.

⁹⁶ *Ingham v. Primrose* (1859), 7 C. B. (N. S.) 82; 141 E. R.; 28 L. J. C. P. 294; cf. *Scholey v. Ramsbottom* (1810), 2 Camp. 485; 170 E. R.; *Redmayne v. Burton* (1860), 2 L. T. 324. As to the rights of a holder of a bank-note accidentally reduced to fragments, see *Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi*, [1928] A. C. 181.

⁹⁷ *Colson v. Arnot* (1874), 54 New York R. 263, at p. 260; cf. *Angle v. N. W. Ins Co.* (1875), 2 Otto, at p. 342, Sup. Ct. U. S.

suppose the name of the payee indorsed upon negotiable paper, fades out so as to be invisible, does it affect the negotiable character of the paper? Most certainly it does. The title and rights of the owner remain the same as before, but a thief could give no title to such a paper to anyone because he cannot be the apparent owner thereof, and there is nothing on the face of the paper to induce the belief that he is the owner ”.

Stolen bills.—By s. 45 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), when a thief is prosecuted to conviction the stolen property is to be restored to the owner, but this provision does not apply to “any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received, by transfer or delivery, by some person or body corporate for a just and valuable consideration without any notice and without any reasonable cause to suspect that the same has been stolen ”. This section reproduces in slightly altered language s. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which is repealed.⁹⁸

Defects of title.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.⁹⁹

This list of defects in title may not be exhaustive. A person whose title is defective must be distinguished from a person with no title at all, who can give none, such as a person making title to a bill through a forged indorsement: see s. 24, and s. 2 for “holder ”.

The words “force and fear ” were inserted in committee as the equivalent of the English technical term “duress”, which is unknown to Scottish law. See *Bell's Principles*, (9th ed.), § 12.

Holder claiming under holder in due course.

(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is

⁹⁸ Cf. *Chichester v. Hill* (1882), 52 L. J. Q. B. 160; and *Moss v. Hancock*, [1899] 2 Q. B. at p. 118, with regard to the Act of 1861. As to Courts of summary jurisdiction, see s. 27 (3) of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

⁹⁹ New York Negotiable Instruments Law, § 94.

not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.¹

ILLUSTRATIONS

1. A partner in a firm fraudulently indorses a firm bill to D in payment of a private debt. E is cognisant of the fraud, but is not a party to it. D indorses the bill to E, who takes it for value and without notice. E indorses it to F. F acquires E's rights. If he gave value to E, he can sue all the parties to the bill; if he did not give value, he can sue all parties except E.²

2. C, by fraud, induces B to make a note in his favour. C indorses the note to D, who takes it for value and without notice. Subsequently, D indorses the note for value back to C. C cannot recover from B.³ He was the author of the fraud.

Presumption of value and good faith.

30. (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.⁴

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course⁵; but if in an action on a bill it is admitted or proved⁶ that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.⁷

ILLUSTRATIONS

1. A draws a bill on B, and indorses it to C. C sues B. It is shown that B accepted it for A's accommodation. C is not called on to prove that he gave value; he can recover without so doing.⁸

2. B makes a note payable to C. C indorses it to D, who sues B. If it appears that B made the note for an illegal consideration, D must prove that he gave value in good faith.⁹

¹ *May v. Chapman* (1847), 16 M. & W. 855, at p. 861; 153 E. R.; *Masters v. Ibberson* (1849), 8 C. B. 100; 187 E. R.; *Marion County v. Clark* (1876), 4 Otto 278, Sup. Ct. U. S.; cf. New York Negotiable Instruments Law, § 97.

² *May v. Chapman* (1847), 16 M. & W. 855; 153 E. R.

³ Cf. *Sawyer v. Wisewell* (1864), 61 Massachusetts R. at p. 42.

⁴ Cf. *Hatch v. Traves* (1840), 11 A. & E. 702; 113 E. R.; *Foster v. Dawber* (1851), 6 Exch. at p. 858; 155 E. R.; New York Negotiable Instruments Law, § 98.

⁵ *King v. Milsom* (1809), 2 Camp. 6; 170 E. R.; New York Negotiable Instruments Law, § 98.

⁶ Evidence to go to a jury was the old test (*Hall v. Featherstone* (1858), 3 H. & N. at p. 286; 157 E. R.; 27 L. J. Ex. at p. 811), and the Act has not altered this: *Talam v. Haslar* (1889), 23 Q. B. D. 345, at pp. 348, 349.

⁷ See *Jones v. Gordon* (1877), 2 App. Cas. at pp. 627, 628, per Lord Blackburn; cf. New York Negotiable Instruments Law, § 98.

⁸ *Mills v. Barber* (1886), 1 M. & W. 425; 150 E. R.

⁹ *Bailey v. Bidwell* (1844), 13 M. & W. 78; 153 E. R.

3. The holder of a bill indorses it to D to get it discounted. D fraudulently negotiates it to E, who negotiates it to F. F sues the acceptor. Evidence is given of D's fraud. F must prove that he is an honest holder for value,¹⁰ or that E was.

4. B makes a note payable to C, the consideration for which is a wager, i.e., a consideration void by statute, but not prohibited under a penalty. C indorses it to D, who sues the maker. Evidence is given of these facts. D is not called on to prove that he gave value.¹¹ But if B proves that D did not give value then B is not liable to D.

5. In an action against the maker of a note payable to bearer it is shown that the note was stolen from the true owner. It lies on the holder to prove that he gave value in good faith.¹²

6. An acceptance is given in renewal of a bill which turns out to be a forgery. The genuine bill is negotiated, and the holder sues the acceptor. Evidence is given of these facts. It lies on the holder to prove that he is an honest holder for value.¹³

7. A partner accepts a bill in the firm's name for a private debt and in fraud of his co-partners. The bill is negotiated. The holder sues the firm as acceptors. As soon as it appears that the bill was given for a private debt, the holder is called upon to prove that he is an honest holder for value.¹⁴

8. Action by payee against husband and wife, the makers of a joint and several promissory note. The wife signed the note under duress from her husband. The onus of proof is not shifted. The wife must give evidence showing that the payee had notice of the duress.¹⁵

9. A by fraud obtains cheques from his employer and pays them into his own account. He then draws cheques in favour of a woman with whom he is living, and the money is credited to her account. The employer can recover the money so paid in from her account.¹⁶

"At the time of the passing of the Act of 1882", says Charles, J., "it was uncertain how much the plaintiff had to prove in cases of this kind where evidence of fraud had been given. Lord Blackburn, in *Jones v. Gordon*, says: 'The language of the quotation from Baron Parke would seem to show that the onus as to both is shifted, but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case'. The learned Judge who tried this case (Field, J.) took the view that the onus was shifted only to the extent of making the plaintiff prove that value was in fact given, not that it was also given *bona fide*. Upon this construction of the Act, I respectfully differ from him. The plaintiff was bound to satisfy the jury that he gave value, and that he gave it in good faith. The Act has settled the law in accordance with the opinion expressed by Parke, B."¹⁷

¹⁰ *Cf. Smith v. Braine* (1851), 16 Q. B. 244; 117 E. R.; *Berry v. Alderman* (1853), 14 C. B. 95; 139 E. R.; *Tatum v. Haslar* (1889), 23 Q. B. D. 535.

¹¹ *Fitch v. Jones* (1855), 5 E. & B. 288; 119 E. R.; *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

¹² *Raphael v. Bank of England* (1855), 17 C. B. 161; 139 E. R.

¹³ *Mather v. Maidstone* (1856), 18 C. B. 273; 139 E. R.; 25 L. J. C. P. 810.

¹⁴ *Hogg v. Skeen* (1885), 18 C. B. (N.S.) 426; 144 E. R.; 84 L. J. C. P. 153.

¹⁵ *Talbot v. Von Boris*, [1911] 1 K. B. 854, C. A.; see p. 97; *Jones v. Waring & Gillo*, [1926] A. C. 670, H. L., does not seem to affect this point.

¹⁶ *Banque Belge v. Hambrouck*, [1921] 1 Q. B. 321, C. A.

¹⁷ *Tatum v. Haslar* (1889), 23 Q. B. D. 345, at p. 349; cf. *Jones v. Gordon* (1877), 2 App. Cas. at p. 628, and *Bailey v. Bidwell* (1844), 13 M. & W. 73, at p. 76; 153 E. R., per Parke, B. See, too, *Oakley v. Boulton* (1888), 5 T. L. R. 60, C. A., and the note thereon in Byles, 16th ed., p. 147.

Sub-s. 2 does not apply to the original payee of a note, but only to subsequent parties. In the case of an original payee the ordinary common law rule prevails that a person alleging fraud or duress must prove it, with the curious consequence that in the matter of proof of fraud the payee is in a more favoured position than the indorsee; no presumptions arise against the payee from proof of fraud, etc., in the creation of the instrument; direct evidence implicating the payee must be given.¹⁸

The section does not affect the practice of the Chancery Division, according to which security must be given when it is sought to restrain the negotiation of a bill alleged to have been obtained by fraud.¹⁹

"Force and fear" is the Scottish equivalent of the English term "duress", but its signification, perhaps, is somewhat wider: see *Bell's Principles* (9th ed.), § 12.

In America, it has been held that if the holder has in good faith given partial value, as in the case of a lien or pledge, he may recover *pro tanto*.²⁰ Probably the same would be held in England.

Rules as to Impeachment of Value

The law as to absence of consideration, or its failure, total or partial, fraud or illegality of consideration may, perhaps, be expressed in the following rules:—

Rule 1.—Immediate and remote parties. Any defence available against an immediate party is available against a remote party who is in privity with such immediate party.

Explanation 1.—"Immediate parties" are parties in direct relation with each other. All other parties are remote. *Prima facie*, the drawer and acceptor, the drawer and the payee, the indorser and his indorsee, are in direct relation. For example:—

(i) A draws a bill on B payable to C, and delivers it to the latter. B accepts the bill while in C's hands. B and C are remote parties.²¹

(ii) B makes a note payable to C. *Prima facie* B and C are immediate parties; but if it appear that B made the note at the request of X under the belief that he had done something which he had not done, and that X on his own account delivered the note to C, who gave value and took it without notice, then B and C (perhaps) may be treated as remote parties.²² *Aliter*, if X had been C's agent.²³

¹⁸ *Talbot v. Von Boris*, [1911] 1 K. B. 864, C. A.

¹⁹ *Hawkins v. Ward*, [1890] W. N. p. 208.

²⁰ *Holcomb v. Wyckoff* (1870), 10 Amer. R. 219; *Dresser v. Missouri Co.* (1876), 3 Otto 92, Sup. Ct. U. S.

²¹ *Robinson v. Reynolds* (1841), 2 Q. B. 196; 114 E. R., Ex. Ch.

²² Cf. *Watson v. Russell* (1862), 3 B. & S. 34; 122 E. R.; 5 B. & S. 968; 122 E. R., Ex. Ch.; as criticised and explained, *Jones v. Waring & Gillow*, [1926] A. C. 670, H. L.

²³ *Astley v. Johnson* (1860), 5 H. & N. 187; 29 L. J. Ex. 161; 157 E. R.

Explanation 2.—Privity is created in all cases by want of consideration, and in some cases by notice, that is to say a party or holder is deemed privy to the facts giving rise to the defence when he (a) has notice of them, or (b) gives no value (or claims through no party giving value), or (c) is the agent of such a party, or (d) is privy by agreement. For example:—

(i) The holder of a bill who has not given value, is, as regards third parties, deemed the agent of the party from whom he received it, whatever their true relations.²⁴

(ii) Notice creates privity when it is notice of defective title in the party from whom the bill is taken, i.e., notice that he had no right to hold the bill or no right to part with it. Title to a bill must be distinguished from the right to enforce payment of it against particular parties,—e.g., the donee of a bill has a good title, though he could not enforce payment against the donor. Whenever a bill is held adversely to the true owner, and there is privity between the true owner and the holder, a third party, if sued, may set up the *jus tertii*.²⁵

(iii) Again, when a person expressly or impliedly agrees to hold a bill as agent or trustee for another person, he holds it subject to all defences against the person for whom he holds, irrespective of the state of accounts between them.²⁶

Rule 2.—Absence of value. Mere absence of consideration, total or partial, is matter of defence against an immediate party or a remote party, who is not a holder for value, but it is no defence against a remote party who is a holder for value.²⁷ An accommodation party is liable to a holder for value, who takes a bill knowing him to be such.²⁸ For example:—

(i) B, by way of gift, makes a note in favour of C. C cannot recover from B.²⁹

(ii) C, the holder of a bill for value, indorses it to D by way of gift. The property in the bill passes to D, but he cannot recover from C.³⁰

(iii) Bill for £100 accepted for the accommodation of the drawer. The drawer discounts it with C, who knows that it is an accommodation bill. C can sue the drawer or acceptor for £100³¹; but

²⁴ Cf. *Fitch v. Jones* (1855), 5 E. & B. at p. 246; 119 E. R.; and cases quoted, p. 54; also *Lec v. Hayes* (1865), 17 Ir. C. L. R. at p. 408.

²⁵ See Rule 5 and notes to a. 21.

²⁶ *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208; 100 E. R., as explained *Currie v. Misa* (1875), L. R. 10 Ex. at p. 164, Ex. Ch.

²⁷ Cf. *Forman v. Wright* (1861), 11 C. B. at p. 492; 186 E. R.

²⁸ *Scott v. Lifford* (1808), 1 Camp. 246; 170 E. R.; cf. *Strong v. Foster* (1855), 17 C. B. at p. 222; *Petty v. Coake* (1871), L. R. 6 Q. B. 790; and s. 28 (2).

²⁹ *Holliday v. Atkinson* (1826), 5 B. & C. 501; 106 E. R.; cf. *Re Whitaker* (1889), 45 Ch. D. 119, C. A., as to voluntary note given by lunatic.

³⁰ *Easton v. Pratchett* (1835), 1 C. M. & R. at p. 808; 149 E. R.; cf. *Milnes v. Dawson* (1860), 5 Exch. 948; 155 E. R.

³¹ Cf. *Mills v. Barber* (1836), 1 M. & W. 425; 150 E. R.; *Sturtevant v. Ford* (1842), 4 M. & Gr. 101.

if C, instead of discounting it, merely advanced £50 on it, he can only recover £50.³²

(iv) B owes A £50. A draws a bill on B for £100. B, to accommodate A, and at his request, accepts it. If A sue B he can recover only £50.³³

(v) C is D's agent abroad. C purchases a bill for D. The bill is made payable to C's order, and he indorses it to D. This is done merely for the purpose of safe transmission and not to guarantee the bill. If the bill is dishonoured, C is not liable to D as indorser.³⁴

(vi) A and C supply goods to B. A draws a bill on B for the price, and indorses it to C to collect on joint account. If the bill is dishonoured, A is not liable to C.³⁵

(vii) B accepts a bill drawn by A to accommodate him. A indorses it to C without receiving value. C indorses to D without receiving value. D cannot recover from B, but it lies on B to show that neither D nor any intervening holder was a holder for value.³⁶

(viii) The payee of a cheque puts it into the hands of his infant child. He then takes it away and locks it up, saying he intends the child to have the money. Subsequently he dies. This is neither a gift nor a declaration of trust.³⁷

(ix) C by will bequeaths a box and its contents to X. The box includes a cheque payable to C, but not indorsed. X is entitled to have this cheque indorsed to him by C's executors.³⁸ *Aliter*, if C had made the gift *inter vivos*.

It has been said that although the donee of a note cannot sue the donor on the instrument, the making of a note in favour of the donee may perhaps be evidence of a declaration of trust in favour of the donee.³⁹ It would seem that the law is quite otherwise.

Rule 3.—Total failure of value. Total failure of consideration is a

³² *Nash v. Brown* (1817), cited Chitty (11th ed.), p. 60; *Jones v. Hibbert* (1817), 2 Stark. 304; 171 E. R.; *Ex p. Newton* (1880), 18 Ch. D. 390, C. A., *proof*.

³³ *Darnell v. Williams* (1817), 2 Stark. 166; 171 E. R. Query, would this be the case if the acceptance were taken in full discharge of the antecedent debt of £50? Probably A could recover the full amount of the bill.

³⁴ *Castrique v. Buttigieg* (1855), 10 Moore P. C. 110; 14 E. R.; cf. *Re Nunn* (1817), Buck. 118.

³⁵ *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

³⁶ *Mills v. Barber* (1836), 1 M. & W. 425; 150 E. R.; cf. *Thompson v. Glubley* (1836), 1 M. & W. 212; 150 E. R.

³⁷ *Jones v. Lock* (1865), L. R. 1 Ch. App. 25; cf. *Re Swinbourns*, [1926] 1 Ch. 38, C. A. (incomplete gift of donor's cheque).

³⁸ *Robson v. Hamilton*, [1891] L. R. 2 Ch. 559.

³⁹ *Arthur v. Clarkson* (1865), 35 Beav. 458; 55 E. R.; but see the criticisms on this class of cases in *Re Whitaker* (1880), 42 Ch. D. 119, at p. 125, C. A. (voluntary note and voluntary bond distinguished).

defence against an immediate party, but is no defence against a remote party, who is holder in due course.⁴⁰ For example :—

(i) B makes a note payable to C. The only consideration is that C is to act as B's executor. C dies first. His personal representative cannot enforce payment against B.⁴¹

(ii) B authorises A to draw on him against bills of lading. A draws a bill on B, and indorses it to C with the bill of lading attached. C gives value to A. B accepts the bill on receiving from C the bill of lading. The bill of lading turns out to be a forgery, but C did not know it when he obtained the acceptances. C can recover from B.⁴²

(iii) A draws a bill at three months on B in favour of C, to be paid for in seven days. B, who is A's agent, accepts on his account. C does not pay A. He cannot sue B.⁴³

(iv) A draws a bill on B payable to his own order. B accepts. The consideration between A and B fails. A subsequently indorses the bill for value to C, who knows that the consideration between A and B has failed. C cannot sue B.⁴⁴

Failure of consideration, it seems, is a defence against a remote holder for value with notice. The reason probably is that it is in the nature of a fraud to negotiate a bill when the holder knows that the consideration on which he received it has failed.⁴⁵ But might there not be cases in which it would not be a fraud to do so? Again, *qu.* as to the effect of failure of consideration after the maturity of the bill, *i.e.*, after a cause of action has accrued? ⁴⁶ When the consideration for a bill wholly fails, the Court will usually restrain its negotiation by injunction.⁴⁷

Rule 4.—Partial failure of value. Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, that is to say, where the amount of the bill is an aggregated sum made up of two or more

⁴⁰ *Robinson v. Reynolds* (1841), 2 Q. B. at p. 211, Ex. Ch.; cf. *Leather v. Simpson* (1871), L. R. 11 Eq. at p. 407. As to what amounts to total failure, *Wells v. Hopkins* (1839), 5 M. & W. 7; 151 E. R.; *Hooper v. Treffry* (1847), 1 Exch. 17; 154 E. R.; cf. *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 638, C. A.

⁴¹ *Solly v. Hinde* (1834), 2 Cr. & M. 516; 149 E. R.

⁴² *Robinson v. Reynolds* (1841), 2 Q. B. 19; 114 E. R., Ex. Ch.; *Leather v. Simpson* (1871), L. R. 11 Eq. 398; *Guaranty Trust Co. of New York v. Hannay* (1918), 28 Com. Cas. 899; [1918] 2 K. B. 642, 652, C. A.

⁴³ *Astley v. Johnson* (1860), 5 H. & N. 187; 157 E. R.; 29 L. J. Ex. 161.

⁴⁴ *Lloyd v. Davis* (1824), 3 L. J. (o.s.) K. B. 86; cf. *Fairclough v. Pavia* (1854), 9 Exch. 890; 156 E. R. (same principle assumed).

⁴⁵ Cf. *Oulds v. Harrison* (1851), 10 Exch. at p. 579; 156 E. R.

⁴⁶ Cf. *Watson v. Russell* (1864), 5 B. & S. at p. 968; 122 E. R.; 34 L. J. Q. B. 93.

⁴⁷ Cf. *Patrick v. Harrison* (1792), 8 Bro. C. C. 476; 29 E. R.; *Bainbridge v. Hemingway* (1805), 12 L. T. 74.

distinct transactions, but not otherwise.⁴⁸ It is no defence against a remote party who is a holder for value.⁴⁹ For example:—

(i) B accepts a bill for £100 drawn by A. This is the agreed price of goods to be supplied by A to B. When the goods arrive they are found to be inferior to sample, and worth only £80. B retains the goods. If A sue B on the bill, this is not a defence *pro tanto*.⁵⁰ But B could now counterclaim.

(ii) B accepts a bill for £100. This is the agreed price of two bales of cotton to be supplied by A to B. A only delivers one bale. A indorses the bill to C, his agent, to collect. C can only recover £50.⁵¹

(iii) B accepts a bill drawn by A for £100. This is the agreed price of two bales of cotton to be supplied by A to B. When the cotton arrives, one bale is found to be inferior to sample, and is returned as useless. A indorses the bill to C without value. If C sues B he can only recover £50, the price of the one bale which is kept.⁵²

In some cases of partial failure of consideration, the Court would perhaps restrain the holder from negotiating the bill after notice.⁵³ Before the Judicature Acts it was important to distinguish between defences to an action on the bill, and matters which could only be dealt with by cross-action, *e.g.*, partial failure of consideration where the amount was not a sum certain. But now any such matters can be included in a counterclaim, which may have all the practical consequences of a defence to the claim or of a set-off.

Rule 5.—Fraud or duress. Fraud is a defence against an immediate party and against a remote party who is not a holder in due course.⁵⁴

A bill is affected with fraud when the issue or any subsequent negotiation of it is obtained by fraud,⁵⁵ or coercion,⁵⁶ or when it is negotiated in breach of faith,⁵⁷ or in fraud of third parties.⁵⁸

The holder of a bill subsequent to a fraud, who is not a holder in

⁴⁸ *Day v. Nir* (1824), 9 Moore 159; 14 E. R.; *Warwick v. Nain* (1855), 10 Exch. 762.

⁴⁹ *Araher v. Bamford* (1822), 3 Stark. 175; 171 E. R.

⁵⁰ *Glenn v. Imri* (1889), 9 Y. & C. 436; 160 E. R.; cf. *Hitchings v. Northern Leather Co. of America*. [1914] 3 K. B. 907 (payee v. indorser).

⁵¹ *Cf. Agri Bank v. Leighton* (1866), L. R. 2 Ex. at pp. 64, 65.

⁵² *Agri Bank v. Leighton*, *supra*.

⁵³ *Cf. Jackson v. Shanks* (1866), 12 Jur. (N.S.) 917.

⁵⁴ *Whistler v. Forster* (1868), 14 C. B. (N.S.) at p. 258; 143 E. R.; 32 L. J. C. P. at p. 168.

⁵⁵ *Wienholt v. Spitta* (1818), 3 Camp. 376; 170 E. R.; *Dawes v. Harness* (1875), L. R. 10 C. P. 166.

⁵⁶ As to duress, *Duncan v. Scott* (1807), 1 Camp. 100; 170 E. R. (*onus probandi*); *Kearns v. Durell* (1848), 6 C. B. 596; 141 E. R.; *Société Anonyme des Hôtels v. Hawker* (1913), 29 T. L. R. 578 (cheque given to hotel keeper in France under threat of prosecution); *White v. Heylman* (1859), 34 Pennsylv. R. 143; *Loomis v. Ruck* (1874), 56 New York R. 462.

⁵⁷ *Lloyd v. Howard* (1850), 15 Q. B. 995; *Barber v. Richards* (1851), 6 Exch. 63; cf. s. 21 (2).

⁵⁸ *Jones v. Gordon* (1877), 2 App. Cas. 616, H. L.

due course (or claiming through such a holder and not a party to the fraud), cannot enforce payment against any party thereto, neither can he retain the bill against the true owner.⁵⁹

When the consideration for a bill is clearly fraudulent, and it is in the hands of a party with notice, the Court will order it to be given up at once. When only a *prima facie* case of fraud is made out, the Court will restrain the negotiation of the bill for a specified time, in order that the question may be tried.⁶⁰

Where a party sued on a bill sets up the *jus tertii* (e.g., if the acceptor when sued by an indorsee sets up that the indorsee obtained the bill by fraud from his immediate indorser), the nature of the fraud must be examined. If the indorser never intended by his indorsement to pass the property in the bill to the indorsee, these facts by themselves are a good defence⁶¹; but if the indorser intended to pass the property in the bill to the indorsee, though induced to do so by fraud, the acceptor must go further and show that the indorser has disaffirmed the transaction.⁶² This distinction arises from the general rule that fraud renders a contract voidable, not void.

Rule 6.—Illegal consideration. Illegality of consideration, total or partial, is a defence against an immediate party, but not against a holder in due course.⁶³ But if a bill or cheque covers wholly distinct transactions, the consideration may be severable, e.g., cheque partly in payment of a gaming debt, and partly a loan to a friend.⁶⁴

The consideration for a bill is illegal when it is wholly or in part immoral, contrary to public policy, or forbidden by statute.⁶⁵ For example:—

(i) Bill accepted for value. The drawer indorses to C for an illegal consideration, e.g., to stifle a prosecution for felony. C can, it seems, sue the acceptor,⁶⁶ but not the drawer.

⁵⁹ *Ibid.*; *Lloyd v. Howard*, *supra*; *Alsager v. Close* (1842), 10 M. & W. 576; 182 E. R.

⁶⁰ Joyce on Injunctions, p. 369; and see *Jones v. Lane* (1829), 3 Y. & C. at p. 293; 160 E. R.; Seton on Decrees, 7th ed., p. 712.

⁶¹ *Lloyd v. Howard* (1850), 15 Q. B. 996; 117 E. R.; *Barber v. Richards* (1851), 6 Exch. 63; 165 E. R.

⁶² *Dawes v. Harness* (1875), L. R. 10 C. P. 166. So held in America, *Frouz v. Roberts* (1850), 69 Massachusetts R. 19; *Carrier v. Sears* (1862), 86 Massachusetts. 386.

⁶³ *Hay v. Ayling* (1851), 16 Q. B. at p. 481; 117 E. R.

⁶⁴ *Robinson v. Marsh*, [1921] 2 K. B. 640; cf. *Hyams v. Stuart King*, [1908] 2 K. B. 698, C. A. (cheque given for gaming debt, subsequent new and valid consideration); *Richardson v. Moncrieffe* (1926), 43 T. L. R. (where the plaintiff failed to bring his claim within the principle of *Hyams v. Stuart King*). Cf. *Poteliakhoff v. Tsakie*, [1938] 3 A. E. R. 686; *Norreys v. Zeffert*, [1939] 2 A. E. R. 187; and see also *Burden v. Harris*, [1937] 4 A. E. R. 559.

⁶⁵ Cf. *Fitch v. Jones* (1856), 5 E. & B. 238; 117 E. R. In *Foster v. Drisgoll*, [1929] 1 K. B. 470, it was held that an agreement of which the object amounts to a breach of international comity is contrary to public policy.

⁶⁶ *Flower v. Sadler* (1882), 10 Q. B. D. 572, C. A. It is submitted by the present editor that the obiter of Brett and Cotton, L.JJ., cannot prevail over the explicit terms of s. 80 (2): otherwise the effect is to treat an illegal consideration as no

(ii) X embezzles the money of a building society. His wife and brother give promissory notes to the society for the amount, on the implied condition that he shall not be prosecuted. The notes are given on an illegal consideration, and cannot be enforced.⁶⁷

(iii) Note made for value. The payee indorses it for an illegal consideration to D. D can, it seems, sue the maker, but not the indorser. *Sed quære*.⁶⁸

(iv) Note made payable to an officer of an unregistered loan society, formed after the Companies Act, 1862, the consideration being a loan by the society. The officer indorses the note to his successor. The society consists of more than twenty members, and is therefore illegal. The indorsee cannot sue the maker.⁶⁹

(v) Note given by defendant to plaintiff in payment of a composition of 5s. in the £. It appears that the plaintiff was induced to assent to the composition by the defendant, unknown to the other creditors, indorsing to him the acceptance of a third person. This fraudulent preference is a good defence to an action on the note.⁷⁰

(vi) A promissory note given to secure the same sum as a bill of sale, and at the same time, may be valid, though the bill of sale may be void for not referring to the note as a ground of defeasance.⁷¹

(vii) Note given by defendant to C in respect of gambling transactions on the Stock Exchange. C indorses the note for value to the plaintiff, who has notice of the facts. The original consideration being merely void under 8 & 9 Vict. c. 109, s. 18, and not illegal, the plaintiff can recover on the note.⁷²

(viii) B having lost money on a horse race, borrows money from C wherewith to pay the debt, and gives C a promissory note for the amount so advanced. If B becomes bankrupt, C can prove on the note for money lent.⁷³

(ix) A, having lost money to C in respect of bets made on a horse race, draws a cheque in C's favour for the amount. C indorses the cheque for value to D, who has notice of the facts. D cannot recover on this cheque, for it was given for an illegal consideration within the meaning of 5 & 6 Will. 4, c. 41, s. 1.⁷⁴

consideration at all. Surely the answer is that the property in the bill did not pass to C, but that C could pass a good title to a holder in due course and that the acceptor paying in due course would obtain a good discharge.

⁶⁷ *Jones v. Merionethshire Building Society*, [1892] 1 Ch. 173, C. A.

⁶⁸ *Armstrong v. Gibson* (1872), 11 Amer. R. 599. Query, see note 66, *supra*.

⁶⁹ *Shaw v. Benson* (1883), 11 Q. B. D. 568, C. A. As to a company or society formed before 1862, see *Shaw v. Simmons* (1883), 12 Q. B. D. 117; and as to effect of illegal society subsequently registering, see *Ex p. Poppleton* (1885), 14 Q. B. D. 379.

⁷⁰ *Howden v. Haigh* (1840), 10 A. & E. 1083; 113 E. R.

⁷¹ *Monetary Advances Co. v. Cater* (1888), 20 Q. B. D. 785.

⁷² *Lilley v. Rankin* (1887), 56 L. J. Q. B. 248.

⁷³ *Ex p. Pyke* (1878), 8 Ch. D. 754, C. A.

⁷⁴ *Woolf v. Hamilton*, [1898] 2 Q. B. 397, C. A. (horse racing is a "game" within the meaning of the 9 Anne, c. 19, and 5 & 6 Will. 4, c. 41).

(x) Cheque given in Algiers on London by an Englishman for money borrowed in order to pay losses at baccarat, an illegal game in England. Baccarat is not an illegal game according to French law. The legality of the cheque must be determined by English law, and the payee cannot recover,⁷⁵ but it seems that the payee can recover in an action on the consideration.⁷⁶

(xi) A stockbroker draws a cheque, leaving the payee's name in blank. His clerk steals the cheque, and fills it up by inserting the name of C, a bookmaker, as payee, and gives it to C in payment of bets. If C cashes the cheque, the drawer can recover the amount from him.⁷⁷

Although the party sued may in many instances set up the *jus tertii*, the cases cited also show that he cannot set up the *injuria tertii* as a defence. A proceeding prohibited by statute must be distinguished from a proceeding which is merely unauthorised.⁷⁸

Regarding relief in equity (e.g., by an order for the delivery up and cancellation of the instrument), Lindley, L.J., said: "A plaintiff is not entitled to relief in equity on the ground of the illegality of his own conduct". [In such a case] "in order to obtain relief, he must prove, not only that the transaction is illegal, he must prove also either pressure or undue influence".⁷⁹

When old cases are referred to, it is important to notice whether the consideration was simply void, or illegal and void, or whether it was a consideration which by the express terms of a statute made the bill void. An illegal consideration must also be distinguished from a merely void consideration.⁸⁰

Rule 7.—Bills void by statute. When a bill is given for a consideration which by statute expressly makes it void, it is, as against the party who gave it, void in the hands of all parties whether immediate or remote.⁸¹ For example:—

(i) A draws a bill on B payable to his own order. B accepts it for a consideration which by statute avoids it. A indorses it to C, who

⁷⁵ *Mouls v. Owen*, [1907] 1 K. B. 746, C. A., Moulton, L.J. dissenting.

⁷⁶ *Saxby v. Fulton*, [1909] 2 K. B. 208, C. A. In *Société Anonyme des Grands Etablissements, etc. v. Baumgart* (1927), 96 L. J. K. B. 789, a person who lent money in France for gaming purposes which were lawful there, and who received a cheque, was held entitled to discard the cheque and sue in England on the loan. But this would not be so if money were lent here in England to enable the borrower to play cards here: *Carlton Hall Club v. Lawrence*, [1929] 2 K. B. 153.

⁷⁷ *Paine v. Bean* (1914), 80 T. L. R. 395.

⁷⁸ *Re Coltman* (1881), 19 Ch. D. 64, C. A.

⁷⁹ *Jones v. Merionethshire Building Society*, [1892] 1 Ch. at p. 182, C. A.

⁸⁰ *Fitch v. Jones* (1855), 5 E. & B. 238; 119 E. R.; and *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

⁸¹ *Edwards v. Dick* (1821), 4 B. & Ald. 212; 106 E. R.; *Shillito v. Thaed* (1881), 7 Bing. 405; 181 E. R., decided on 9 Anne, c. 19, before the passing of 5 & 6 Will. 4, c. 41.

takes it for value and without notice. C can sue A,⁸² but he cannot sue B.⁸³

Most, if not all, the statutes which expressly avoided bills are now repealed, e.g., the laws relating to usury and stock-jobbing. By the Gaming Act, 1710 (9 Anne, c. 19), bills or notes given for money won by "gaming or playing at cards, tables, dice, tennis, bowles or other game or games, or by betting on the sides or hands of such as do game at the same" are made void; but by the Gaming Act, 1885 (5 & 6 Will. 4, c. 41), such bills or notes are no longer to be void, but are to be deemed to have been given for an illegal consideration, and by s. 2 of that Act money paid thereon is to be recoverable as a debt. The Gaming Act, 1922 (12 & 13 Geo. 5, c. 19), repeals s. 2 and provides that no action for the recovery of money under the said section shall be entertained in any Court.⁸⁴ By the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 19, all contracts by way of gaming and wagering are made null and void.

The result is that bills or notes which come within the purview of 9 Anne, c. 19, must be dealt with as given for an *illegal* consideration, while bills or notes arising out of other gaming or wagering transactions are deemed merely to be given for a *void* consideration,⁸⁵ i.e., for no consideration.

The Gaming Act, 1892 (55 & 56 Vict. c. 9), makes null and void any promise to pay any person any money paid by him in respect of any contract rendered void by the Act of 1845.⁸⁶

As to securities in the hands of moneylenders under a transaction which is void and in the hands of indorsees (not being moneylenders), see the Moneylenders Act, 1911, s. 1, and the Moneylenders Act, 1927, s. 17 (1) and pp. 85, 86.

If any part of the consideration is illegal, the holder (not being a holder in due course) cannot recover on the instrument.⁸⁷

As regards card games, at any rate, the law in Scotland is similar to the law in England.⁸⁸

As to trading with the enemy, see p. 64.

⁸² *Edwards v. Dick* (1821), 4 B. & Ald. 212; 106 E. R.

⁸³ *Ibid.*; *Reed v. Wiggins* (1862), 13 C. B. (N.S.) 220; 32 L. J. C. P. 181; 138 E. R.

⁸⁴ For previous law, see *Suiters v. Briggs*, [1922] 1 A. C. 1, H. L., and cases there cited.

⁸⁵ *Lilley v. Ranken* (1887), 56 L. J. Q. B. 248 (gambling on Stock Exchange).

⁸⁶ See, e.g., *Saffery v. Meyer*, [1901] 1 K. B. 11, C. A.

⁸⁷ Cf. *Moulis v. Owen*, [1907] 1 K. B. at p. 758, C. A., unless the consideration is severable, *Robinson v. Marsh*, [1921] 2 K. B. 640. As to subsequent new and valid consideration, see *Hyams v. Stuart King*, [1908] 2 K. B. 696, C. A. As to pleading illegality, see *Lipton v. Powell*, [1921] 2 K. B. 51.

⁸⁸ *Tyler v. Maxwell* (1892), 20 Sc. L. R. 583, 584. But note that the reason for non-enforcement of gaming contracts in Scotland is that they are considered *spensiones ludicrae*.

Negotiation of Bills

Negotiation defined.

31. (1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.⁸⁰

See s. 2 for "holder" and "issue". The negotiation of a bill or note has been distinguished from the sale of goods, by Holroyd, J.⁸⁰; from the transfer of shares in a company, by Byles, J.,⁸¹ and from the transfer of an assignable Scottish bond, by Blackburn, J.⁸²; and see note to sub-s. (3). As to negotiation and pledge, see p. 89.

Bill to bearer.

(2) A bill payable to bearer is negotiated by delivery.

See "bearer" and "delivery" defined by s. 2. As to delivery for a special purpose, see s. 21. And s. 8 (8) for definition of a bill payable to bearer.

"A bill of exchange", says Parke, B., "is a chattel, and the gift is complete by delivery, coupled with the intention to give".⁸³

Bill to order.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

As to indorsement, see ss. 2 and 82. See s. 8 (4) for definition of a bill payable to order. As to restrictive indorsements, see s. 85. He who personates the holder, or who makes title through a forged indorsement, is not the holder.⁸⁴

The nature of negotiation was thus described by Lord (then Mr. Justice) Blackburn: "In the notes to *Miller v. Race*,⁸⁵ where all the authorities are collected, the very learned author⁸⁶ says: 'It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery,

⁸⁰ Cf. New York Negotiable Instruments Law, § 60; *Lloyds Bank v. Gooke*, [1907] 1 K. B. at p. 808, C. A.

⁸¹ *Wookey v. Pole* (1820), 4 B. & Ald. at p. 10; 106 E. R., comparing them with money.

⁸² *Swan v. N. B. Australasian Co.* (1868), 2 H. & C. at pp. 184, 185; 32 L. J. Ex. 278; 159 E. R.

⁸³ *Crouch v. Crédit Foncier* (1878), L. R. 3 Q. B. at p. 381.

⁸⁴ *Mines v. Dawson* (1850), 5 Exch. 948, at p. 950; 155 E. R.; cf. *Denton v. Peters* (1870), L. R. 5 Q. B. at p. 477.

⁸⁵ 8. 24; cf. *Smith v. Union Bank* (1875), L. R. 10 Q. B. at pp. 295, 296; and see note to s. 24.

⁸⁶ 1 *Smith L. C.*, 18th ed., p. 524.

⁸⁷ I.e., John William Smith (1809—1845).

and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt'. Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who by a *genuine* indorsement, or, where it is payable to bearer, by delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title, notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."⁹⁷

In Scotland "indorsement carries the bill only, but leaves untransmitted the diligence which may have been raised on it, and has no effect in transferring dividends due on the bill out of a sequestered estate, or any guarantee or other collateral obligation or security". *Bell's Principles* (9th ed.), § 881.

Transfer of bill to order without indorsement.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill,⁹⁸ and the transferee in addition acquires the right to have the indorsement of the transferor.⁹⁹

ILLUSTRATIONS

1. The holder of a bill payable to order transfers it to D for value without indorsing it. D cannot sue the acceptor in his own name, or negotiate the bill by indorsing it to E.¹

⁹⁷ *Crouch v. Crédit Foncier* (1879), L. R. 8 Q. B. 874, at p. 881.

⁹⁸ *Whistler v. Forster* (1868), 14 C. B. (N.S.) at p. 258; 148 E. R.; 32 L. J. C. P. at p. 168, *per* Willes, J.; *Ex p. Pike* (1879), 40 L. T. (N.S.) 529; New York Negotiable Instruments Law, § 79.

⁹⁹ *Harrop v. Fisher* (1861), 10 C. B. (N.S.) at p. 208; 142 E. R.; 30 L. J. C. P. at p. 286, *per* Byles, J. As to an express promise to indorse which was held not to create a mutual credit, see *Rose v. Sims* (1880), 1 B. & Ad. 521. As to enforcement of order by Court to indorse, see s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), p. 364.

¹ *Harrop v. Fisher* (1861), 10 C. B. (N.S.) at p. 208; 142 E. R., Byles, J.; and *Gunliffe v. Whitehead* (1837), 8 Bing. N. C., at p. 880.

2. The drawer of an accepted bill, payable to drawer's order, discounts it with C, but by mistake omits to indorse it. C indorses the bill in blank in the drawer's name. He cannot recover from the acceptor, for he had no right to indorse,² but the drawer could be compelled to indorse.³

3. C, the holder of a bill payable to order, transfers it for value to D without indorsing it. If C becomes bankrupt, the Court will compel his trustee in bankruptcy to indorse the bill.⁴ If C dies, the Court will compel his executor or administrator to indorse.⁵

4. The drawer of an accepted bill payable to drawer's order transfers it for value to C without indorsing it. C returns the bill to the drawer for his indorsement. The drawer destroys it. C has no claim against the acceptor.⁶

5. The payee of a bill payable to his order deposits it in June as security with X but without indorsing it. In July he is restrained by injunction from negotiating the bill. In October he gives X his indorsement. This is a negotiation of the bill and a breach of the injunction.⁷

It is to be noted that when indorsement is subsequently obtained, the transfer takes effect as a negotiation from the time when the indorsement is given.⁸ The scope of the rule is thus explained by Willes, J., who says: "The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These being part of the currency, are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not a transfer which is valid [only] in equity according to the doctrine respecting the assignment of choses in action; and it is therefore clear that in order to acquire the benefit of this rule the holder must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose in action, and has no better title than his assignor".⁹

² *Harrop v. Fisher* (1861), 10 C. B. (N.S.) 196; 142 E. R.; 80 L. J. C. P. 288.

³ *Wallers v. Neary* (1904), 21 T. L. R. 146.

⁴ *Ex p. Mowbray* (1820), 1 Jac. & W. 428; 87 E. R. Indorsement should negative personal liability. Indorsement by bankrupt is, it seems, equally good: *Ex p. Rhodes* (1837), 3 Mont. & Ayr. 217.

⁵ *Ct. Watkins v. Maule* (1820), 2 Jac. & W. 248; 87 E. R.

⁶ *Edge v. Bumford* (1862), 81 L. J. Ch. 805.

⁷ *Day v. Longhurst* (1863), 62 L. J. Ch. 334.

⁸ *Whistler v. Forster* (1863), 14 C. B. (N.S.) 248; 143 E. R.; see, too, *Lancaster Bank v. Taylor* (1869), 1 Amer. R. 71; *Clark v. Whitaker* (1871), 9 Amer. R. 286; New York Negotiable Instruments Law, § 79, and cases cited in Crawford's edition.

⁹ *Whistler v. Forster* (1863), 14 C. B. (N.S.) at pp. 257, 258; 139 E. R.; 82 L. J. C. P. p. 163.

Indorsement by representative.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.¹⁰

See s. 16 (1) for indorsements limiting or negating liability, and s. 26 for indorsements in a representative capacity.

Requisites of a valid indorsement.

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

- (1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.¹¹

Allonge or "copy".

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself.

ILLUSTRATIONS

1. C, the holder of a bill, signs it and writes thereon, "I hereby assign this draft and all benefit of the money secured thereby to D". This is an indorsement by C.¹²

2. C, the holder of a note, signs it and writes thereon, "I bequeath—Pay the within to D, or his order, at my death", and gives it to D. This is not an indorsement, but an attempted testamentary gift, invalid under the Wills Act.¹³

3. An express promise in writing to indorse a bill is not an indorsement.¹⁴

4. The assignment of a note by a separate writing is not an indorsement.¹⁵

By s. 2 "indorsement" means an indorsement completed by delivery. As to delivery, see s. 21. As to negotiation, see s. 81. As to signature by agent, see s. 91, and signatures generally, p. 281. As to indorsement of bill drawn in a set, see s. 71. As to the so-called indorsement where a person, not the holder, writes his name on the back to guarantee it, see s. 56. For a discussion of the practice of many commercial firms of stamping variants of their description on the back of bills, see the judgment of Goddard, J., in *Bird & Co. v. Thomas Cook and others*, [1937] 2 A. E. R. 227.

¹⁰ New York Negotiable Instruments Law, § 74.

¹¹ New York Negotiable Instruments Law, § 61.

¹² *Richards v. Frankum* (1840), 9 C. & P. at p. 225; 173 E. R.

¹³ *Mitchell v. Smith* (1864), 38 L. J. Ch. 698, but see s. 88.

¹⁴ Cf. *Harrop v. Fisher* (1861), 10 C. B. (N.S.) at p. 204; 142 E. R.; 80 L. J. C. P. 286; and *Ross v. Sims* (1880), 1 B. & Ad. 521; 109 E. R.

¹⁵ *Re Barrington* (1804), 2 Scho. & Lef. 119; cf. *Ex p. Harrison* (1789), 2 Brown C. C. 614.

It has been held that where a bill broker who has discounted bills re-discounts them with his bankers, and instead of indorsing each bill gives a general guarantee, he can prove against the acceptor for the amount he has to pay under his guarantee and interest, if the bills are dishonoured.¹⁶

An indorsement on the face of a bill is valid.¹⁷

When there is no room on a bill for further indorsements, a slip of paper, called an "allonge", may be attached thereto. It becomes part of the bill, and indorsements may be written thereon.¹⁸

Some of the foreign codes contain minute provisions to prevent frauds, e.g., that the first indorsement on the allonge must begin on the bill and end on the allonge; otherwise an allonge might be taken from one bill and stuck on to another: cf. *Nouguier*, § 668.

As to "copies", see *Nouguier*, §§ 208—211, and German Exchange Law, Arts, 70—72. A "copy" of a bill must be distinguished from the parts of a set: see s. 71, p. 281.

Partial indorsement.

- (2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.¹⁹

ILLUSTRATIONS

1. C, the holder of a bill for £100, indorses it, "Pay £50 to D or order, and £50 to E or order". This is invalid. Neither D nor E can sue or further indorse.²⁰

2. C, the holder of a bill for £100, indorses it, "Pay D or order £90". This is invalid, unless C also acknowledges the receipt of £70.²¹

A partial indorsement, purporting to split the right of action on a bill, is invalid as a negotiation, but may operate as an authority to receive payment of the amount thereby specified.²²

¹⁶ *Ex p. Bishop* (1880), 15 Ch. D. 400, C. A.

¹⁷ *Young v. Glover* (1887), 8 Jur. (N.S.) Q. B. 687; *Ex p. Yates* (1868), 2 De G. & J. 191; 44 E. R.; 27 L. J. Bkcy. 9.

¹⁸ Cf. *Monmohunee v. Secretary of State* (1874), 18 Bengal L. R. 369. Cf. New York Negotiable Instruments Law, § 61, and cases cited in Crawford's edition.

¹⁹ Cf. New York Negotiable Instruments Law, § 82, which repeats this sub-r., and adds that "where the instrument has been paid in part, it may be indorsed as to the residue".

²⁰ Cf. *Haybut v. Nevill* (1869), L. R. 4 C. P. at p. 858; *Conover v. Earl* (1868), 26 Iowa 169. See *Nouguier*, § 665.

²¹ *Hawkins v. Cardy* (1899), 1 Ld. Raym. 360; 91 E. R.

²² Cf. *Haybut v. Nevill* (1869), L. R. 4 C. P. at p. 858; *Conover v. Earl* (1868), 26 Iowa 169. See *Nouguier*, § 665.

Several payees or indorsees.

- (3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.²¹

ILLUSTRATIONS

1. Bill payable "to the order of C and D". D alone indorses it to E. This is insufficient. E cannot sue the acceptor.²¹

2. Bill payable "to the order of C and D". C, with D's authority, indorses it "for self and D". This is sufficient.

3. Bill payable to "C and D, or the order of either of them". C alone indorses it. This is sufficient.²⁵

4. Cheque payable to A B *per* X, should be indorsed "A B *per* X", not "X" simply.²⁶

Qu. in Illustration 2, as to the liability of D as indorser? Where a dividend warrant is payable to the order of two or more persons the custom is to pay on the indorsement of any one of them; and by s. 97 (3) (d), the usages with respect to dividend warrants are expressly saved.

Misdescription of payee or indorsee.

- (4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.²⁷

ILLUSTRATION

A bill is indorsed to J. Smythe. The man's real name is T. Smith. He can validly negotiate the bill by indorsing it as J. Smythe.²⁸

It should be noticed that the sub-section is not obligatory in its terms. It is usual and proper for the holder to write first the name as described or spelt in the bill, and adding underneath his proper signature.

If a person trades under an assumed name, can he validly negotiate a bill payable to him under his trade name by indorsing it in his individual name or *vice versa*—e.g., John Smith trades as "Brown and Co." A bill is drawn payable to the order of "Brown and Co." He indorses it as John Smith. Is the presentment for

²³ New York Negotiable Instruments Law, § 71.

²⁴ *Carvick v. Vickery* (1781), 2 Dougl. 652; 99 E. R.; cf. *Heilbut v. Nevill* (1869), L. R. 4 Q. B. at pp. 356, 358, *per* Willes, J.

²⁵ *Watson v. Evans* (1868), 32 L. J. Ex. 187.

²⁶ *Slingsby v. District Bank* (1931), 47 T. L. R. 587.

²⁷ Cf. New York Negotiable Instruments Law, § 73. Cf. *Bird & Co. v. Thomas Cook and others*, [1937] 2 A. E. R. 227.

²⁸ *Watson v. Evans* (1868), 32 L. J. Ex. 187; and cf. *Willis v. Barrett* (1816), 2 Stark 29; 171 E. R.; cf. s. 7 (1).

payment of this bill by the indorsee a due presentment? In Massachusetts it seems it is.²⁹ The point was raised in *Walker v. Macdonald*,³⁰ but the decision proceeded on the ground that there was a prior indorsement in blank, and therefore the bill was payable to bearer. Such an indorsement is clearly irregular, if not invalid.³¹

A question sometimes arises as to how a bill payable (say) to "Mrs. John Jones" should be indorsed. The proper form appears to be "Ellen Jones, the wife of John Jones". The form sometimes adopted, viz., "Mrs. John Jones", may be irregular, but it is difficult to see why it should be invalid.

When the title to a bill payable to order is transmitted by act of law, and the person to whom the title is transmitted obtains possession of the bill, he has the rights of the holder. See transmission by marriage (p. 127), death (p. 127), execution (p. 127), bankruptcy (p. 128). See also dissolution of partnership (p. 71). In America an exception to the general rule is admitted in the case of corporations. Thus a bill payable to the order of the cashier or other officer of a bank is deemed to be payable to the bank; therefore, any person who can indorse for the bank can negotiate such a bill—e.g., C is the cashier of the "X Bank", and D is the president. A bill bought by the bank is indorsed "pay to order of C, cashier". The "X Bank" can sue on the bill in the corporate name, and D the president can validly indorse it away without a previous indorsement by C.³² The expediency of this exception is doubtful, but it has been adopted by § 72 of the New York Negotiable Instruments Law.

Order of indorsements.

- (5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

Illustrations of where the contrary was proved are to be found in *Macdonald v. Whitfield*, *National Sales Corporation v. Bernhardt*, and *McCall Bros., Ltd. v. Hargreaves*.³³

²⁹ *Bryant v. Eastman* (1861), 61 Mass. R. 111.

³⁰ (1848), 2 Exch. 527; 154 E. R.

³¹ The present editor fails to understand why (having regard to the terms of s. 32 (4)) an indorsement by J. Smith in his own name should be invalid when the order is in fact payable to J. Smith however described. Cf. *Bud & Co. v. Thomas Cook and others*, [1937] 2 A. E. R. 227, and *Bank of Montreal v. Exhibit Trading Co.* (1906), 11 Com. Cas. 250. [Note made payable to an unincorporated company. After incorporation the note is indorsed by the company. The indorsement is obviously irregular. Cf. *Kelner v. Baxter* (1868), 2 C. P. 174.]

³² *Waterollet Bank v. White*, 1 Denio 609; *First Nat. Bank v. Hall* (1871), 44 New York R. 895.

³³ (1883), 8 App. Cas. 785; [1931] 2 K. B. 188; (1932) 147 L. T. 257.

Kinds of indorsement.

- (6) An indorsement may be made in blank or special.
It may also contain terms making it restrictive.

See s. 35 as to restrictive indorsements.

Conditional indorsement.

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.³⁴

ILLUSTRATION

An indorsement running, Pay to the order of C "on the arrival of the ship *Swallow* at Calcutta", or "on his marriage with D", would be conditional. See s. 11 (2).

This section alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled.³⁵ This was hard on him. If he dishonoured the bill, he might be liable in damages, and yet it might be impossible for him to find out if the condition had been fulfilled.

Under this section, as between indorser and indorsee the condition would presumably be operative. If the indorsee received payment without the condition being fulfilled, he would hold the proceeds in trust for the indorser. The continental codes do not recognise conditional indorsements. S. 52 of the Indian Negotiable Instruments Act, 1881, appears to preserve the common law rule.

Indorsement in blank.

34. (1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

ILLUSTRATION

Bill payable to the order of John Smith. He signs on the back, "John Smith". This act is interpreted by the law merchant as an indorsement in blank by John Smith, and operates as if he had written—1. I hereby assign this bill to bearer. 2. I hereby undertake that if this bill be dishonoured, I will indemnify the bearer, on receiving due notice thereof.

By s. 31 (2), a bill payable to bearer is negotiated by delivery.³⁶
Under French Code, Arts. 137, 138, an indorsement in blank merely

³⁴ Cf. New York Negotiable Instruments Law, § 69, which further provides that "any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally".

³⁵ *Robertson v. Kensington* (1811), 4 Taunt. 80; 138 E. R.

³⁶ See *Peacock v. Rhodes* (1781), 2 Dougl. at p. 636; 99 E. R., per Lord Mansfield; and see indorsement in blank distinguished from special indorsement, *per* Wilde,

operated as a "procuration", and not as a negotiation of the bill. The indorsee was considered as the agent, or "mandataire", of the indorser, and their relations were regulated accordingly.³⁷ But by the Law of February 8, 1922, an indorsement in blank is now recognised as a negotiation of the bill.

Special indorsement.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

ILLUSTRATIONS

- 1 "Pay D or order".
2. "Pay to D & Co.", which in legal effect is "Pay D & Co. or order" See s. 8 (4).
3. "Pay to the order of the D Company", which in legal effect is "Pay the D Company or order".³⁸

A bill specially indorsed is payable to the indorsee therein designated, and can only be negotiated by his indorsement.³⁹ A special indorsement following an indorsement in blank displaces the previous indorsement in blank.

Provisions as to payee apply to indorsee.

(8) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

See ss. 7 and 8 as to payee.

Conversion of blank into special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.⁴⁰

ILLUSTRATION

The holder of a bill, indorsed by C in blank, writes over C's signature the words, "Pay to the order of D". The holder who does this is not liable as an indorser, but the transaction operates as a special indorsement from C to D.⁴¹

C.J., *Harmer v. Steele* (1849), 4 Exch. at p. 15; 154 E. R.; per Parks, B., *Roberts v. Tucker* (1851), 16 Q. B. at p. 579; 117 E. R.; and per Erle, C.J., *Law v. Parnell* (1859), 7 C. B. (N.S.) at p. 286; 141 E. R.; 29 L. J. C. P. at p. 19.

³⁷ Nougner, §§ 747—760; and see *Bradlaugh v. De Rin* (1870), L. R. 5 C. P. 473, Ex. Ch.

³⁸ *Soures v. Glyn* (1845), 8 Q. B. 24; 115 E. R., Ex. Ch. See s. 8 (5).

³⁹ See s. 81 (3); and *Harrop v. Fisher* (1861), 30 L. J. C. P. 288.

⁴⁰ Cf. New York Negotiable Instruments Law, § 65.

⁴¹ *Vincent v. Horlock* (1808), 1 Camp. 442; 170 E. R.; cf. *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340; German Exchange Law, Art. 12; and Nougner, §§ 747, 748.

Striking out Indorsements.—The holder may at any time (e.g., at the trial after the plaintiff has finished his case)⁴² strike out any indorsement which is not necessary to his title. The indorser, whose indorsement is intentionally struck out, and all indorsers subsequent to him, are discharged from their liabilities; *aliter* if the indorsement be struck out by mistake.⁴³ *Qu.* if the present system of open pleading affects the necessity for striking out indorsements where the action is against the acceptor? The holder may, in some cases, make title through a person whose indorsement is struck out.⁴⁴ Indorsements for collection may be struck out by the owner of the bill,⁴⁵ and if the indorser of a bill takes it up or pays it when dishonoured, he may strike out his own and all subsequent indorsements, whether blank or special.⁴⁶

Restrictive indorsement.

35. (1) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D only", or "Pay D for the account of X", or "Pay D or order for collection".⁴⁷

ILLUSTRATIONS

The following are restrictive:—

1. "Pay D or order for the use of X".⁴⁸
2. "Pray pay the money to my use".⁴⁹
3. "Pay the contents to my servant for my use".⁵⁰
4. "The within must be credited to D, value in account".⁵¹
5. "Pay the contents to my use", or "Pay the contents to the use of X", or "Carry this bill to the credit of X".⁵²
6. "Pay D or order for our use, value received in account".⁵³

⁴² *Mayer v. Jadis* (1883), 1 M. & Rob. 247; 174 E. R.; Byles 154.

⁴³ *Wilkinson v. Johnson* (1824), 3 B. & C. 428; 107 E. R.; cf. New York Negotiable Instruments Law, § 78, which embodies this statement.

⁴⁴ *Fairlough v. Pavia* (1854), 9 Exch. at p. 695; 156 E. R.; but cf. *Bartlett v. Benson* (1845), 14 M. & W. 783.

⁴⁵ *Dugan v. United States* (1818), 3 Wheat. 178; *Bank of Utica v. Smith* (1820), 18 Johns. 229, New York.

⁴⁶ *Callow v. Lawrence* (1814), 3 M. & S. 95; 105 E. R.; German Exchange Law, Art. 55. See also s. 59 (2).

⁴⁷ Cf. New York Negotiable Instruments Law, § 68, and cases cited in Crawford's edition.

⁴⁸ *Evans v. Cramlington* (1687), 1 Show. 4; 89 E. R.; 2 Show. 509; 89 E. R., Ex. Ch.

⁴⁹ *Snee v. Prescott* (1748), 1 Atk. at p. 249; 28 E. R.

⁵⁰ *Edie v. East India Co.* (1761), 2 Burr. at p. 1227; 97 E. R., Wilmot, J.

⁵¹ *Anchor v. Bank of England* (1781), 2 Dougl. 687; 99 E. R.

⁵² Cf. *Rice v. Stearns* (1807), 3 Mass. R. at p. 226.

⁵³ *Wilson v. Holmes* (1809), 5 Mass. R. 543.

7. "Pay D or order for the account of X",⁵⁴
8. "Pay D or order for my use",⁵⁵
9. "Pay to the order of D & Co., under provision for my note in favour of X",⁵⁶
10. "Pay D & Co. or order for collection",⁵⁷

A statement in an indorsement that the value for it has been furnished by some person other than the indorsee does not make it restrictive,⁵⁸ e.g., bill indorsed "Pay D or order value in account with X". This is not restrictive. It is in effect a simple indorsement to D or order.⁵⁹

The mere omission to add words of negotiability to a special indorsement does not make it restrictive: see s. 8 (1) and (4).

In an unreported case a bill indorsed in Germany "*für mich*, etc.," was held to be restrictive, as being an indorsement "for my account", but it was afterwards agreed that this was a mistranslation, and that the words meant merely "as for me", and were not restrictive.⁶⁰

Restrictive indorsement.

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that the indorser could have sued,⁶¹ but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so.⁶²

ILLUSTRATIONS

1. Bill indorsed "Pay to D for my account". D cannot by indorsing it to E authorise E to collect it. *After* if the indorsement ran, "Pay D or order for my account".⁶³

2. Bill indorsed "Pay D or order for collection per account of C Bank". If the C Bank receives payment before maturity, D cannot recover from the acceptor, although he has credited the C Bank with the amount of the bill.⁶⁴

⁵⁴ *Treuttel v. Barandon* (1817), 8 Taunt. 100; 129 E. R.; *Blains v. Bourns* (1875), 23 Amer. R. 481. But as to a cheque crossed "for account payee", see *National Bank v. Silke* (1890), 1 Q. B. 499; 118 E. R.

⁵⁵ *Sigourney v. Lloyd* (1828), 8 B. & C. 622; affirmed, 5 Bing. 525; 180 E. R., Ex. Ch.

⁵⁶ *Wedlake v. Hurley* (1880), Lloyd & Welsby, 380; 1 C. & J. 88; 148 E. R.

⁵⁷ *Swaney v. Easter* (1868), 1 Wallace 166, Sup. Ct. U. S.; *Merchants' Bank v. Henson* (1884), 53 Amer. R. 5; *Williams, Deacon & Co. v. Shadbolt* (1885), 1 C. & E. 529; cf. German Exchange Law, Art. 17.

⁵⁸ *Potts v. Reed* (1806), 6 Esp. 57; 170 E. R.; *Murrow v. Stuart* (1868), 8 Moore P. C. 267; 14 E. R.

⁵⁹ *Buckley v. Jackson* (1868), L. R. 3 Ex. 185.

⁶⁰ *Haarblicker v. Baerselmann* (1914), Times, October 14.

⁶¹ *Evans v. Cramlington* (1887), 2 Show. 509; 89 E. R., Ex. Ch.; *Wilson v. Holmes* (1800), 5 Massachus. R. 548; cf. German Exchange Law, Art. 17.

⁶² *Lloyd v. Sigourney* (1829), 5 Bing. at p. 532; 180 E. R., Ex. Ch.; cf. *Pothier*, No. 89; German Exchange Law, Art. 17; New York Negotiable Instruments Law, § 87.

⁶³ *Lloyd v. Sigourney* (1829), 5 Bing. at p. 532; 180 E. R.

⁶⁴ *Williams, Deacon & Co. v. Shadbolt* (1885), 1 C. & E. 529, per Cave, J.

It has never been attempted to make the payer responsible for the due application of the proceeds by the indorsee, and it is clear that he is not responsible.

(8) Where a restrictive indorsement authorises further transfer, all subsequent indorseees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.⁶⁶

ILLUSTRATIONS

1. C indorses a bill "Pay D or order for my use". D indorses it to, and discounts it with, E on his own account. E collects it at maturity. C can recover the amount of the bill from E.⁶⁶

2. C indorses a bill "Pay D or order for the use of X". D collects the bill at maturity. If he misappropriate the money X cannot sue him.⁶⁷ The action must be brought by C.⁶⁸

3. C indorses a bill "Pay D or order for account of X". D is X's agent. D indorses the bill to E, who collects it. X can sue E for the amount so received.⁶⁹

4. A draws a bill on B, and indorses it to C. C indorses it, "Pay D or order for my use". The bill is dishonoured, and D sues A the drawer. If A have any defence against C he may set it up against D.⁷⁰

Where a bill is indorsed restrictively the relations between indorser and indorsee are substantially those of principal and agent.⁷¹ If, for instance, the acceptor pay the indorser, it seems that the indorsee cannot sue him, though the indorsee really gave value for the bill.⁷² The indorsee is frequently referred to in the cases as a trustee, but he is only a trustee in the sense that an agent or bailee is a trustee.⁷³ German Exchange Law, Art. 17, deals with agency or restrictive indorsements and accords substantially with this section; so, too, does s. 50 of the Indian Act.

How long bill continues negotiable.

36. (1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

⁶⁶ *Treuttel v. Barandon* (1817), 8 Taunt. 100; 129 E. R.; *Lloyd v. Sigourney* (1829), 5 Bing. at p. 531; 130 E. R.; *Swaeney v. Easter* (1863), 1 Wallace, D. 166, Sup. Ct. U. S.; German Exchange Law, Art. 17; New York Negotiable Instruments Law, § 67.

⁶⁷ *Lloyd v. Sigourney* (1829), 5 Bing. 525; 130 E. R., Ex. Ch.

⁶⁸ *Wedlake v. Hurley* (1830), *Lloyd & Welsby* 380; 1 C. & J. 89; 148 E. R.

⁶⁹ *Ibid.*, at pp. 382, 88, per Vaughan, B.

⁷⁰ *Treuttel v. Barandon* (1817), 8 Taunt. 100; 129 E. R. If D had not been X's agent, C must have brought the action.

⁷¹ *Wilson v. Holmes* (1809), 5 Mass. R. 543.

⁷² Cf. *Potts v. Reed* (1806), 6 Esp. at p. 59; 170 E. R.; *Rice v. Stearns* (1807), 8 Massachusetts. R. at p. 532.

⁷³ *Williams, Deacon & Co. v. Shadbolt* (1885), 1 Q. & E. 629, Cave, J.

⁷⁴ Cf. *Cook v. Lister* (1869), 13 C. B. (N.S.) at p. 597; 145 E. R.; 32 L. J. C. P. 121; see the position of an agent or bailee compared with a trustee, strictly so called, by Jessel, M.R., in *Re Hallett's Estate* (1879), 13 Ch. D. at pp. 708—711, C. A.

"A bill of exchange", says Lord Ellenborough, in language a little too wide, "is negotiable *ad infinitum* until it has been paid by, or discharged on behalf of, the acceptor".⁷⁴ See ss. 59—64 and 68 for discharges, and s. 85 (2) for restrictive indorsements. The character and incidents of negotiability depend on the time of negotiation. For negotiation, see s. 81. As to transfer of an incomplete bill, see s. 20.

After action brought.—The fact that an action has been brought on a dishonoured bill does not determine its negotiability; but if a bill be transferred, after action brought, to embarrass the defendant, his remedy is by application to the Court.⁷⁵ If judgment were obtained, the bill would be extinguished by merger as between the defendant and the plaintiff or any subsequent party.

Negotiation of overdue bill.

(2) When an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.⁷⁶

ILLUSTRATIONS

1. Note payable to C's order made for an illegal consideration. C indorses it, when overdue, to D. D cannot recover from the maker.⁷⁷

2. Bill obtained from the drawer for a special purpose. C, in fraud of that purpose, indorses the bill when overdue to D. D cannot recover from the acceptor.⁷⁸

3. Bill payable to drawer's order is accepted subject to a certain condition then agreed on between drawer and drawee. The drawer indorses the bill when overdue to C. C takes the bill subject to the agreed condition, though he had no notice of it.⁷⁹

4. Bill accepted for an illegal consideration. The drawer indorses it before maturity to C, who takes it for value and without notice. C indorses the bill when overdue to D. D can sue all parties, for C had a good title.⁸⁰

5. The holder of a bill is indebted to the acceptor, *e.g.*, for rent. If, then, he sues the acceptor the arrears of rent can be set off; but if he indorses the bill when overdue to D for value, the acceptor has no right of set-off against D.⁸¹

6. Action by third indorsee of a bill against the first indorser. Although the

⁷⁴ *Callow v. Lawrence* (1814), 3 M. & S. at p. 97; 105 E. R.; cf. *Leavitt v. Putnam* (1850), 3 New York R. at p. 497; New York Negotiable Instruments Law, § 77.

⁷⁵ *Deuters v. Townsend* (1854), 33 L. J. Q. B. 801; cf. *Woodward v. Pell* (1868), L. R. 4 Q. B. 55.

⁷⁶ Compare the language in s. 81 as to cheques marked "not negotiable".

⁷⁷ *Amory v. Meryweather* (1824), 3 B. & C. 573; 107 E. R.

⁷⁸ *Lloyd v. Howard* (1850), 15 Q. B. 995; 117 E. R.; cf. *Redfern v. Rosenthal* (1902), 86 L. T. 855, C. A.

⁷⁹ *Holmes v. Kidd* (1858), 28 L. J. Ex. 112, Ex. Ch.

⁸⁰ *Chalmers v. Lanion* (1808), 1 Camp. 369; 170 E. R.; *Fairclough v. Pavia* (1854), 9 Exch. 590; 156 E. R.; cf. s. 26 (3).

⁸¹ *Oulds v. Harrison* (1854), 10 Exch. 572; 156 E. R.; *Ex p. Swan* (1868), L. R. 3 Eq. 844. The indorsement of a bill, in this respect, differs from the ordinary assignment of a chose in action: *Rosburgh v. Cox* (1880), 17 Ch. D. 520, C. A.

plaintiff took the bill when overdue, the defendant cannot set off a debt due to him from an intermediate holder and indorser.⁸²

7. The indorsee of a note sues the maker. The maker may show that the note has been satisfied as between himself and the payee, and that the payee indorsed the note to the plaintiff when it was overdue, and after satisfaction to the payee.⁸³

8. The manager of the "X Bank" abstracts moneys belonging to the bank, and purchases therewith an overdue bill of exchange, which he negotiates to D. The "X Bank" and not D is entitled to the bill, and can prove against the acceptor's estate if he become bankrupt.⁸⁴

9. A bill payable three months after date is accepted to accommodate the drawer. After the bill is overdue the drawer indorses to C for value. C can recover from the acceptor.⁸⁵

10. A bill of exchange, indorsed in blank, is handed in Norway to S, who is agent for C and D, and who was jointly interested in the bill. The bill is seized in Norway for a debt of D's, and, after it is overdue, is sold to F. The proceedings are regular according to Norwegian law. F has a good title to the bill as against C.⁸⁶

The above illustrations clearly bring out the difference between a personal right of set-off (Illustrations 5 and 6) and a defect in title.

For "negotiation", see s. 81 (1). For "defect of title", s. 29 (2); it was substituted for the equivalent expression "equity attaching to the bill", as that term was unknown in Scottish law. "If", says Buller, J., "a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. . . . But where a note is due the party receiving it takes it on the credit of the person who gives it to him".⁸⁷

After a long controversy it now seems settled that mere absence of consideration is not an equity which attaches to a bill,⁸⁸ but that if there be an agreement express or implied not to negotiate an accommodation bill after maturity, the agreement constitutes an equity attaching to it.⁸⁹ In New York it has been held that if an accommodation bill be negotiated when overdue the holder cannot recover, for the bill is in terms a credit for a limited time, and to negotiate it after that time is a breach of faith.⁹⁰

Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect—they are rather grounds of nullity. That which purports to be a bill is no longer such; it is

⁸² *Whitehead v. Walker* (1842), 10 M. & W. 696; 152 E. R.

⁸³ *Brown v. Davies* (1789), 3 T. R. 80; 100 E. R.

⁸⁴ *Ex p. Oriental Bank* (1870), L. R. 5 Ch. 358; cf. *Lee v. Zergury* (1817), 8 Taunt. 114; 129 E. R.; and, by analogy, *Re Gomersall* (1875), 1 Ch. D. 137. As to the limits of the principle that the rights of a person not a party to the bill may constitute an equity attaching to it, see *Warren v. Haigh* (1875), 65 New York R. 171.

⁸⁵ *Stein v. Iglesias* (1834), 1 C. M. & R. 565; 149 E. R.

⁸⁶ *Alscock v. Smith*, [1892] 1 Ch. 288, C. A.

⁸⁷ *Brown v. Davies* (1789), 3 T. R. 80, at p. 82; 100 E. R.

⁸⁸ *Sturtevant v. Ford* (1842), 4 M. & Gr. 101; 184 E. R.; *Ex p. Swan* (1868), L. R. 8 Eq. 844.

⁸⁹ *Parr v. Jewell* (1855), 16 C. B. 684; 139 E. R., Ex. Ch.; *Carruthers v. West* (1847), 11 Q. B. 148, is not to the contrary. See *ratio decidendi*, per Wightman, J.

⁹⁰ *Chester v. Dorr* (1869), 41 New York R. 279.

mere waste paper. Part payment, however, may be regarded as an equity which attaches to a bill.⁹¹ The position of a holder who takes a bill when overdue is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two inquiries: 1. Has what ought to have been done really been done, *i.e.*, has the bill in fact been discharged? 2. If not why not? Is there any equity attaching thereto; *i.e.*, was the *title* of the person who held it at maturity defective? If his title to the instrument was complete it is immaterial that for some collateral reason, *e.g.*, a set-off, he could not have enforced the bill against some one or more of the parties liable thereon. In France, it seems, no distinction is drawn between overdue and current bills: *Nouguier*, §§ 679, 680. By German Exchange Law, Art. 16, the indorsee of an overdue and protested bill acquires only the rights of the indorser.

When deemed overdue.—A bill payable otherwise than on demand is overdue after the expiration of the last day of grace.⁹² As to instruments on demand, see sub-s. 8; and as to dishonoured bills, see sub-s. 5. By German Exchange Law, Art. 16, a bill is not deemed to be overdue till the time for protesting it has elapsed.

Bills negotiated abroad.—The provisions of this section perhaps do not apply to a bill which is negotiated in a foreign country, where no distinction is recognised between overdue and current bills.⁹³

Bill on demand, when overdue.

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.⁹⁴

See s. 10, defining what bills are payable on demand. Compare s. 40 (8) as to the test of reasonable time.

By s. 86 (8) notes payable on demand, which are regarded as continuing securities, are exempted from this sub-section.⁹⁵

⁹¹ *Graves v. Key* (1832), 3 B. & Ad. at p. 319; 110 E. R.

⁹² Cf. *Leffley v. Mills* (1791), 4 T. R. 170; 100 E. R.

⁹³ *Alcock v. Smith*, [1892] 1 Ch. 238, affirmed on the ground that the evidence disclosed no defect of title. See note to s. 72 (3).

⁹⁴ Cf. New York Negotiable Instruments Law, § 92, and cases cited in Crawford's edition.

⁹⁵ *Brooks v. Mitchell* (1841), 9 M. & W. 15; 152 E. R.

By virtue of s. 78, this enactment applies to cheques. Therefore a person who takes a stale cheque, takes it at his peril. In a case in 1881, where the previous decisions are reviewed, a cheque negotiated eight days after date was held not to be on the footing of an overdue bill,⁹⁶ but a cheque taken two months after date has been held to be stale.⁹⁷ Most banks refuse to pay a cheque six months old without special orders from their customer, but there seems to be no general practice on this point.

Presumption as to date of negotiation.

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

This is declaratory⁹⁸; but there is no presumption as to the exact time of negotiation.⁹⁹ It seems that circumstances of strong suspicion, short of direct evidence, may rebut the *prima facie* presumption, and make it a question for the jury whether the bill was negotiated before or after maturity.¹

Bill known to be dishonoured.

(5) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

ILLUSTRATION

A bill is dishonoured by non-acceptance, and afterwards indorsed by the plaintiff, who knows that it has been so dishonoured. The plaintiff, who is the third indorsee, takes the bill subject to any agreement between the first and second indorsers as to the discharge of the former.²

This sub-section settles a disputed point, by putting a bill known to be dishonoured on the same footing as an overdue bill.³ S. 29,

⁹⁶ *London and County Bank v. Grooms* (1881), 8 Q. B. D. 288; cf. *Rothschild v. Corney* (1829), 9 B. & C. 388; 109 E. R. (six days).

⁹⁷ *Serrel v. Derbyshire Ry.* (1850), 9 C. B. 811; 137 E. R.; cf. *Ex p. Hughes* (1880), 48 L. T. (N.S.) 577 (as to dishonoured cheques), and *Hummelman v. Hotelling* (1870), 6 Amer. R. 600.

⁹⁸ *Lewis v. Parker* (1886), 4 A. & E. 888; 111 E. R., cf. s. 80 (2), and New York Negotiable Instruments Law, § 75.

⁹⁹ *Anderson v. Weston* (1840), 6 Bing. N. C. 296; 133 E. R.

¹ *Bounsall v. Harrison* (1886), 1 M. & W. 611; 150 E. R.

² *Crossley v. Ham* (1811), 13 East 498; 104 E. R.; cf. *Whitehead v. Walker* (1842), 10 M. & W. 696; 152 E. R., where the bill was dishonoured by non-acceptance, though it was spoken of as overdue; *Hornby v. McLaren* (1908), 24 T. L. R. 494 (cheque known to have been dishonoured).

³ *Affirma Crossley v. Ham* (1811), 13 East 498; 104 E. R.; and *quoad hoc* overrides *Goodman v. Harvey* (1836), 6 Nev. & Man. 372.

defines "holder in due course"; see s. 48, as to dishonour by non-acceptance. In America the decisions are conflicting. As to negotiating a bill after action brought, see note to sub-s. 1.

Negotiation of bill to party already liable thereon.

37. Where a bill is negotiated back to the drawer, or to a prior indorser,⁴ or to the acceptor,⁵ such party may, subject to the provisions of this Act,⁶ re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.⁷

ILLUSTRATIONS

1. Bill payable three months after date is indorsed by the holder to the acceptor. At any time before maturity the acceptor may re-issue the bill and indorse it away.⁸

2. The drawer of a bill payable to drawer's order indorses it to C, who indorses it to D, who indorses it back to the drawer. The drawer, either before or after its maturity, may re-issue the bill and indorse it to E.⁹

3. The drawer of a bill payable to drawer's order indorses it for value to C, who indorses it to D, who indorses it back to the drawer. The drawer cannot recover from C or D, for they in turn could recover from him as drawer.¹⁰

4. The payee of a bill indorses it "without recourse" to D, who indorses it to E, who indorses it back to the payee. The payee, in his character of third indorsee, can sue D and E, for they have no claim against him as a prior indorser.¹¹

5. The drawer of a bill indorses it to C, who has previously undertaken to be responsible for the price of goods supplied to the acceptor. C indorses the bill back to the drawer. These indorsements were the means used to implement C's undertaking. The drawer, in his character of indorsee, can sue C, for C has no remedy over against him because of C's undertaking to be responsible for the price of the goods.¹²

6. C undertakes to guarantee a debt due from B to A. B signs a blank acceptance, which C indorses. The document is then handed to A, who fills it up as a bill payable to drawer's order, inserting his own name as drawer. C, though an indorser, is liable to A, the drawer on this bill.¹³

The rule in the present section is a rule against circuity of action,¹⁴ and as the cases show, *cessante ratione cessat ipsa lex*.

⁴ Cf. s. 59 (2).

⁵ See note to s. 59 (1), and s. 61.

⁶ See ss. 59—64 for discharges; and especially s. 59 (2) as to taking up bills; and s. 61 as to coincidence of right and liability.

⁷ Cf. New York Negotiable Instruments Law, § 80, which substitutes "personally" for "previously".

⁸ *Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244.

⁹ Cf. *Hubbard v. Jackson* (1827), 4 Bing. 890; 182 E. R.; *Jones v. Broadhurst* (1850), 9 C. B. 178; 137 E. R. This is subject to s. 59 (2), (3).

¹⁰ Cf. *Bishop v. Hayward* (1791), 4 T. R. 470; 100 E. R.; *Wilders v. Stevens* (1846), 15 M. & W. at p. 212; 158 P. R.

¹¹ Cf. *Morris v. Walker* (1850), 15 Q. B. at p. 594; 117 E. R. There is here no circuity of action.

¹² *Wilkinson v. Unwin* (1831), 7 Q. B. D. 636, G. A.

¹³ *Glenie v. Bruce Smith*, [1908] 1 K. B. 268, C. A. Cf. *McCall Brothers, Ltd. v. Hargreaves*, [1932] 2 K. B. 428.

¹⁴ *Holmes v. Durken* (1868), 1 C. & E. 28.

By s. 86 (1) a bill is negotiable until it is restrictively indorsed or discharged. As to discharges, see ss. 59—64, and note that an accommodation bill is discharged when paid at maturity by the person accommodated, and that any bill is discharged when the acceptor is or becomes the holder of it at or after maturity.

Rights of the holder.

38. The rights and powers of the holder of a bill are as follows :—

- (1) He may sue on the bill in his own name ¹⁵ :
- (2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill ¹⁶ :
- (3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill. ¹⁷

This section deals with the rights acquired by negotiation—that is, by transfer according to the form required by the law merchant: see s. 81. See “holder” defined by s. 2; “holder for value” defined by s. 27 (2) and (8); and “holder in due course” defined by s. 29. For “defects of title”, see s. 29 (2); and for “payment in due course”, s. 59. S. 45 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50) (which provides for the revesting of stolen property in the true owner when the thief is convicted), does not apply to negotiable instruments. A defective title must be distinguished from entire absence of title. A person who claims under a forgery has no title, and can give none. He is not the “holder” of the instrument. ¹⁸

The power to negotiate a bill must be distinguished from the right to negotiate it. The right to negotiate is an incident of ownership; the power to negotiate is an incident of apparent ownership. Again,

¹⁵ Cf. *Crouch v. Crédit Foncier* (1878), L. R. 8 Q. B. at pp. 380—382; New York Negotiable Instruments Law, § 90.

¹⁶ Cf. *Crouch v. Crédit Foncier* (1878), L. R. 8 Q. B. at pp. 380—382; and see note to s. 81 (8).

¹⁷ *Marston v. Allen* (1841), 8 M. & W. at p. 504; 151 E. R., per Alderson, B., stating the principle.

¹⁸ But as to transfers abroad and the effect of forgery, see notes to s. 72 (2) as to conflict of laws.

the right to recover, as distinguished from the mere right to sue, depends on the further question whether the holder is a holder for value, and in some cases whether he is a holder for value without notice. The law as to the holder's rights of action and proof may perhaps be stated in the following rules :—

Rights of Action and Proof

Rule 1.—Holder's right of action. The holder of a bill is entitled to maintain an action thereon in his own name against all or any of the parties liable thereon, unless it is shown that he holds the bill adversely to the true owner,¹⁹ that is to say, it is always competent in the owner or holder of a bill indorsed to him in blank to hand it over to another for the purpose of suing on it, because it is immaterial that the holder never had any interest in the bill,²⁰ or that he has parted with his interest therein.²¹

Suing as agent or trustee.—When the holder of a bill sues as agent for another person, or when he sues wholly or in part for the benefit of another person, any defence or set-off available against that person is available *pro tanto* against the holder.²² For example :—

(i) C, the holder of a bill, indorses it to D for collection. D can sue on it, but any defence available against C is available against D.²³

(ii) D is the holder of a dishonoured bill for £100 indorsed by C. C pays D £60. D sues the acceptor. As to £60 D sues as trustee for C, and only as to £40 on his own account. As regards £60, any set-off which the acceptor may have against C is equally available against D.²⁴

(iii) A draws a bill on B, payable to his own order, for the price of goods supplied, which B accepts. A then indorses the bill to C. A cannot sue B for the price of the goods supplied while the bill is outstanding in the hands of C, and it is immaterial that he gets the bill back before the trial.²⁵

Where a person holds a bill as agent or trustee for another, he

¹⁹ *Jones v. Broadhurst* (1850), 9 C. B. 178; 137 E. R.; *Agia Bank v. Leighton* (1866), L. R. 2 Ex. at pp. 63–65. See holder defined by s. 2.

²⁰ *Law v. Parnell* (1859), 7 C. B. (N.S.) 282; 141 E. R.; 29 L. J. C. P. 17.

²¹ *Williams v. James* (1850), 16 Q. B. 498; 117 E. R.; *Poirier v. Morris* (1858), 2 H. & B. 89; 118 E. R.; cf. *Magrath v. Gray* (1874), L. R. 9 C. P. 216.

²² *Lee v. Zagury* (1817), 8 Taunt. 114; 129 E. R.; *Royce v. Baines* (1846), 52 Massachusetts. 276; *Agra Bank v. Leighton* (1866), L. R. 2 Ex. 56; *Re Anglo-Greek Navigation Co.* (1869), L. R. 4 Ch. 174; Pothier, No. 41; cf. *Becherovise v. Lewis* (1872), L. R. 7 C. P. 872.

²³ *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208; 109 E. R., as explained by *Currie v. Misa* (1875), L. R. 10 Ex. at p. 164, Ex. Ch.

²⁴ *Thornton v. Maynard* (1875), L. R. 10 C. P. 695.

²⁵ *Davis v. Reilly*, [1898] 1 Q. B. 1; followed *Re A Debtor*, [1908] 1 K. B. 844, 849, C. A. Cf. *Bence v. Shearman*, [1898] 2 Ch. 582, C. A.

cannot use it as a set-off against a claim made against him individually.²⁶

Rule 2.—Action on bill payable specially. Subject to the rules as to transmission by act of law, when a bill is payable to a particular person or persons, or to his or their order, an action thereon must be brought in the name of such person or persons.²⁷ For example :—

(i) A bill is specially indorsed to the firm of “D & Co.” An action on it must be brought in the name of the firm. The managing partner cannot sue on it in his own name.

(ii) A bill is specially indorsed to D, a partner in the firm of X & Co., in payment of a debt due to the firm. An action on it must be brought in D’s name, and not in the name of the firm.²⁸

In the case given in Example (i), the managing partner might indorse the bill in the firm’s name to himself or in blank, and then sue.

Rule 3.—Action on bill payable to bearer. Subject to Rule 1, when a bill is payable to bearer an action thereon may be brought in the name of any person who has either the actual or the constructive possession thereof; and constructive possession, jointly with others, is sufficient to entitle the possessor to sue alone. For example :—

(i) C, the holder of a bill, indorses it in blank to D. to collect it for him. Either C or D may sue the acceptor.²⁹

(ii) A bill accepted by B is indorsed in blank by C. D, E, and F bring an action on the bill against B. They can recover, although there is no evidence to show that they are partners, or what the nature of their joint interest is.³⁰

(iii) A bill is indorsed in blank to a firm. Any one of the partners may bring an action on it in his own name.³¹

(iv) A bill indorsed in blank is handed to the manager of a company in payment of a debt due to the company. The manager may sue on it in his own name.³²

(v) A bill indorsed in blank is given to D’s solicitor, who commences an action on it against the acceptor in D’s name. D knows nothing of the matter, but after the action has proceeded some way he is told of it, and then gives his consent. D can maintain the action.³³

²⁶ *London and Bombay Bank v. Narraway* (1872), L. R. 15 Eq. 93.

²⁷ *Attwood v. Rattenbury* (1822), 6 Moore, at p. 688; *Pease v. Hirst* (1829), 10 B. & C. 122; 109 E. R.

²⁸ *Bawden v. Howell* (1841), 3 M. & Gr. 688; 188 E. R.

²⁹ *Clark v. Pigot* (1699), 12 Mod. 198; 88 E. R.; cf. *Stoness v. Butt* (1884), 2 Cr. & M. 416; 149 E. R.

³⁰ *Ord v. Portal* (1812), 8 Camp. 289; 170 E. R.; cf. *Rordasns v. Leach* (1816), 1 Stark. 446; *Low v. Copestake* (1828), 3 C. & P. 900; 172 E. R.

³¹ *Lindley*, 8rd ed. p. 495; *Attwood v. Rattenbury* (1822), 6 Moore 579; *Wood v. Connop* (1848), 5 Q. B. 292; 114 E. R., as to joint holders; *Conover v. Earl* (1868), 26 Iowa R. 168, as to holders in common.

³² *Lido v. Parnell* (1859), 7 C. B. (N.S.) 282; 141 E. R.

³³ *Anson v. Marks* (1862), 81 L. J. Ex. 169.

(vi) D, the holder of a bill indorsed in blank, does not wish to sue on it in his own name. He accordingly asks E to sue on it. E consents. E gets a copy of the bill, and it is agreed that he shall have the original when wanted. E commences an action against the acceptor, and after action brought he gets the bill. E cannot maintain this action, for at the time he began it he had neither the actual nor the constructive possession of the bill.³⁴

(vii) A note payable to bearer is handed to the solicitor of a loan society in payment of a debt due to the society. D, a member of the society, instructs the solicitor to commence an action on it in his (D's) name against the maker. D can maintain this action.³⁵

Rule 4.—Holder's right of proof. When a party to a bill becomes bankrupt, the holder, who could have maintained an action against such party if he had remained solvent, can prove against his estate in bankruptcy.³⁶

Any defence, set-off, or counterclaim available in an action is available against a proof.³⁷

In one respect the right of proof is more extensive than the right of action. An action can only be brought to recover a debt which is due, but under the Bankruptcy Act, 1914, s. 80, a future or contingent debt may be proved; therefore, if the acceptor of a bill not yet due becomes bankrupt, the holder may prove, and so might the drawer or an indorser³⁸—so, too, the holder of an accepted bill may prove if the drawer or an indorser becomes bankrupt.³⁹ But as regards amount, the right to prove is narrower in some respects than the right to sue. The amount for which a holder can prove is limited by rules peculiar to bankruptcy, such as the rules relating to double proof⁴⁰ and creditors holding security.⁴¹ These are beyond the scope of the present work. The material provisions of the Bankruptcy Act, 1914 are set out, p. 360.

³⁴ *Emmett v. Tottenham* (1853), 8 Exch. 884; 155 E. R.; cf. *Olcott v. Rathbone* (1890), 5 Wend. 490, New York.

³⁵ *Jenkins v. Tongue* (1860), 29 L. J. Ex. 147.

³⁶ Cf. Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 50), s. 59; cf. *Re Charles* (1878), L. R. 8 Ch. at p. 537. As to holder having a lien only, see notes to s. 27 (8).

³⁷ See, e.g., *Rohde v. Proctor* (1825), 5 B. & C. 517; 108 E. R. (want of notice of dishonour); *Es p. Manners* (1811), 1 Rose 68 (want of a stamp); cf. *Jones v. Gordon* (1877), 2 App. Cas. 627, H. L.

³⁸ Cf. *Wood v. De Mottos* (1865), L. R. 1 Ex. 91, Ex. Ch.

³⁹ Cf. *Starey v. Barnes* (1806), 7 East 435; 103 E. R.

⁴⁰ See, e.g., *Re Douglas* (1872), L. R. 7 Ch. 490 (foreign bankruptcy); approved, *Banco de Portugal v. Waddell* (1880), 5 App. Cas. at p. 165; *Williams' Bankruptcy*, 18th ed., p. 184.

⁴¹ See, e.g., *Re House* (1871), L. R. 6 Ch. 838 (conditional acceptance). As to lumping bills for purposes of proof, see *Re Morris*, [1899] 1 Ch. 485, C. A. As to cross-accommodation acceptances, see *Williams' Bankruptcy*, 18th ed., pp. 163, 164, discussing the rule in *Es p. Walker* (1798), 4 Ves. 373; 31 E. R.

Transmission by Act of Law

The Act deals only with transfer by negotiation—that is, transfer according to the law merchant. It leaves untouched the rules of general law which regulate the transmission of bills by act of law, and their transfer as choses in action or chattels according to the general law: see s. 97 (2). The law on these points may, perhaps, be summed up in the following rules:—

Rule 1.—Marriage. Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a bill payable to a woman, either before or after marriage, no longer vests in her husband.

Before that Act, except in the case of a bill forming part of the wife's separate estate,⁴² if a bill was held by an unmarried woman who subsequently married, or if a bill was made payable to a married woman, the title thereto vested in the husband, provided he reduced it into possession.⁴³

If the husband died without having reduced the bill into possession, the title thereto reverted to the wife if she was alive, and passed to her personal representatives if she died before her husband.⁴⁴

Rule 2.—Death. On the death of the holder of a bill the title thereto passes to his personal representatives. Thus:—

(i) C, the holder of a bill payable to order, dies. His administrator can enforce payment of it or indorse it away, using his own name.⁴⁵

(ii) C, the holder of a bill payable to order, dies, having specifically bequeathed it to X. X cannot sue on it or indorse it away, unless he first obtain the indorsement of C's executor.⁴⁶

An executor or administrator indorsing a bill may expressly exclude personal liability (s. 31 (5)). As he is not the agent of the deceased, he cannot by his delivery complete an indorsement written by the latter. He must indorse it *de novo*: see p. 54. When there are two or more executors, the indorsement of one is probably sufficient to transfer the property in the bill.⁴⁷

Rule 3.—Execution. A bill may be seized in execution by the sheriff under a writ of *feri facias*.⁴⁸

⁴² *Green v. Carlill* (1877), 4 Ch. D. 882.

⁴³ *Cf. Fleet v. Perrins* (1868), L. R. 3 Q. B. at p. 541; affirmed (1869), L. R. 4 Q. B. 500.

⁴⁴ *Hart v. Stephens* (1845), 6 Q. B. 997; 115 E. R.; Williams on Executors, 12th ed. pp. 521—523.

⁴⁵ *Rawlinson v. Stone* (1748), 3 Wils 1; 95 E. R., Ex. Ch. He should specify the capacity in which he indorses to make the title clear.

⁴⁶ *Bishop v. Curtis* (1852), 21 L. J. Q. B. 391.

⁴⁷ Williams on Executors, 12th ed. p. 602, n. There is more doubt as to administrators: *ibid.* p. 305.

⁴⁸ 1 & 2 Vict. c. 110, s. 12. As to a cheque drawn by the Accountant-General of the Court of Chancery but not issued, *cf. Watts v. Jefferyes* (1851), 3 Mac. & G. 422; 42 E. R.; *Courtney v. Vincent* (1852), 21 L. J. Ch. 291.

Payment to the sheriff of a bill so seized is valid, and, if the judgment creditor give security, an action may be brought on the bill in the name of the sheriff.⁴⁹

The language of the Judgments Act, 1888, p. 339, is obscure and ungrammatical. Can the sheriff hand over to the creditor or sell a bill payable to bearer?⁵⁰ The Act gives him no power to indorse a bill payable to order. Further, he is responsible to the judgment debtor for any surplus over the amount of the debt and costs. It would seem, then, that he must keep all bills and endeavour to collect them himself. For execution against bills and notes under the County Courts Act, 1934 (24 & 25 Geo. 5, c. 58), ss. 121, 128; see p. 845. As to indorsement by order of the High Court, see s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, p. 864.

Rule 4.—Bankruptcy. If the holder of a bill, who is the beneficial owner of it, become bankrupt, or if a bill be made payable to a bankrupt for his own account, the title thereto vests in his trustee in bankruptcy⁵¹; but subject to the next rule (reputed ownership), if the holder of a bill is not the beneficial owner of it, the title thereto does not pass to his trustee in bankruptcy.⁵² Thus :—

(i) C indorses a bill to D, his agent, for some special purpose. D becomes bankrupt. The title to the bill does not vest in D's trustee.⁵³

(ii) D, by fraud, induces C to indorse a bill to him. D becomes bankrupt. The title to the bill does not pass to D's trustee.⁵⁴

The title of the trustee relates back to the commencement of the bankruptcy, the exact time of which is sometimes difficult to determine. When the holder has merely a lien on a bill his trustee stands exactly in his shoes, as to rights and duties regarding it.⁵⁵ Where a bill is indorsed to an undischarged bankrupt, it seems he may sue on it in his own name, unless his trustee interferes and objects.⁵⁶

Exception 1.—The bankrupt holder of a bill who negotiates it before the date of the receiving order can give a good title to a

⁴⁹ 1 & 2 Vict. c. 110, s. 13, set out, p. 339.

⁵⁰ Cf. *Mutton v. Young* (1847), 4 C. B. at p. 378; 136 E. R.

⁵¹ Cf. Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38; cf. *Gresen v. Steer* (1841), 1 Q. B. 707.

⁵² Bankruptcy Act, 1914, s. 38; *Harrison v. Walker* (1792), Peake 111; 170 E. R.

⁵³ *Ex p. Armistead* (1828), 2 G. & J. 371; cf. *Belcher v. Campbell* (1845), 8 Q. B. at p. 11; 115 E. R. See, e.g., *Thompson v. Giles* (1824), 2 B. & C. 422; 107 E. R. (bill entered "short" by banker); *Ex p. Plitt, re Brown* (1889), 6 Monell 81 (cheque specially intrusted for collection).

⁵⁴ *Harrison v. Walker* (1792), Peake 111; 170 E. R.

⁵⁵ Cf. *Ex p. Buchanan* (1812), 1 Rose 280.

⁵⁶ *Herbert v. Sayer* (1844), 6 Q. B. 965; 114 E. R.; approved, *Jameson v. Brick and Stone Co.* (1878), 4 Q. B. D. 208, C. A.; cf. *Cohen v. Mitchell* (1890), 25 Q. B. D. 262, at p. 269.

person who takes it in good faith for value, and without notice that such holder has committed an available act of bankruptcy."⁵⁷

Exception 2.—Payment of a bill to a bankrupt holder is valid if made in good faith before the date of the receiving order without notice of any available act of bankruptcy.⁵⁸

Exception 3.—An accommodation bill given for the accommodation of the bankrupt (probably) does not pass to the trustee in bankruptcy. Thus :—

A draws a bill on B payable to his own order. B accepts it to accommodate A. A is adjudicated bankrupt. He subsequently indorses the bill to C, who gives value. The indorsement is valid. C can sue B.⁵⁹

In spite of the very wide terms of the Bankruptcy Act, 1914 (s. 88), these cases probably still hold good.

Rule 5.—*Reputed ownership.* If the holder of a bill who is not the beneficial owner of it, become bankrupt, the title thereto may pass to his trustee in bankruptcy, as being in his reputed ownership, provided (a) that the bill constitutes "a debt due or growing due to him in the course of his trade or business"; (b) that he held it at the commencement of the bankruptcy with the consent and permission of the true owner.⁶⁰ It seems clear that a current bill would constitute a "debt growing due" within the meaning of the Act.⁶¹

Transfer by Assignment.

Rule 6.—*Assignment or sale.* A bill may be transferred by assignment or sale on the same conditions required for an ordinary chose in action. Thus :—

C is the holder of a note payable to his order. He may transfer his title to D by a separate writing assigning the note to D,⁶² or by a voluntary deed constituting a declaration of trust in favour of D,⁶³ or by a written contract of sale.⁶⁴

⁵⁷ Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45. As to what constitutes such notice, see *Ex p. Gilbey* (1878), 8 Ch. D. 248, C. A.

⁵⁸ Bankruptcy Act, 1914, s. 45.

⁵⁹ *Wallace v. Hardacre* (1807), 1 Camp. 45; 170 E. R.; *Willis v. Freeman* (1810), 12 East 656; 104 E. R.

⁶⁰ Bankruptcy Act, 1914, s. 88 (2) (c); cf. *Ex p. Kemp* (1874), L. R. 9 Ch. App. at p. 389; *Williams' Bankruptcy*, 1st ed., pp. 272, 277.

⁶¹ *Ex p. Kemp* (1874), L. R. 9 Ch. at p. 388, Mellish, L.J. As to the previous law, cf. *Hornblower v. Proud* (1819), 2 B. & Ald. 327; 106 E. R.; *Thompson v. Giles* (1824), 2 B. & C. 422; 107 E. R. As to the effect on a debt of a bill drawn by a bankrupt, see *Re Goetz*, [1898] 1 Q. B. 787; 118 E. R., C. A.

⁶² *Re Barrington* (1804), 2 Scho. & Lef. 112; cf. *Lee v. Magrath* (1882), 10 Ir. L. R. 45, 318.

⁶³ *Richardson v. Richardson* (1867), L. R. 3 Eq. 686, as explained in *Warriner v. Rogers* (1879), L. R. 16 Eq. 340; cf. *Ex p. Whitaker* (1889), 42 Ch. D. 119, C. A., distinguishing a voluntary note from a voluntary bond.

⁶⁴ *Sheldon v. Parker* (1874), 3 Hun. New York R. 498.

A bill is a chattel; therefore it may be transferred as a chattel.⁶⁵ A bill is a chose in action; therefore it may be assigned as a chose in action.⁶⁶ It is clear that a subsequent title under the law merchant would override a prior title under a sale or assignment according to the general law, *e.g.*, C, the holder of a bill payable to bearer, assigns by deed certain property, including the bill, to D. C no longer has any property in the bill, but he holds it, and if he transfers it by delivery to E, who takes it for value and without notice, E's title overrides D's.⁶⁷ It seems now quite settled that a non-negotiable note cannot be assigned, there being an intention manifest in the instrument to that effect.⁶⁸ Notice to a debtor who has given a cheque or other negotiable instrument for his debt that the debt has been assigned by the creditor can be disregarded by the debtor, even if the creditor who has assigned the debt is the holder of the instrument.⁶⁹

Rule 7.—Donatio mortis causa. If the holder of a bill make delivery of it by way of gift in contemplation of death and die, this is a valid *donatio mortis causa*.⁷⁰ Thus :—

1. C, the holder of a note payable to bearer, hands it to D in contemplation of death. C dies. The property in the note passes to D.⁷¹

2. C, the holder of a bill payable to his order, gives it to D in contemplation of death, and dies. The title to the bill passes to D.⁷² On the question of indorsement, see the comments below at p. 181.

3. B makes a note payable to C, and hands it to him as a gift in contemplation of death. B dies. C (perhaps) is not entitled to receive the amount out of B's estate,⁷³ but see the comments below at p. 181.

4. C, the holder of a banker's deposit note, with a form of cheque on the back, gives it to D in contemplation of death and dies. D is entitled to the money.⁷⁴

5. Bank-notes are given to C as a *donatio mortis causa*. The donor

⁶⁵ *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677, C. A. The validity of the transfer depends on the law of the country where the bill is transferred. (Cf. Parke, B.'s dictum in *Milnes v. Dawson* (1850), 5 Exch. 948, quoted p. 106.)

⁶⁶ It may constitute a "book debt": *Dawson v. Isle*, [1906] 1 Ch. 683.

⁶⁷ Cf. *Sheldon v. Parker* (1874), 8 Hun. R. 498; *Aulton v. Atkins* (1856), 18 C. B. 249; 189 E. R.; and s. 81 (4).

⁶⁸ *Hibernian Bank, Ltd. v. Gysin and Hanson*, [1930] 1 K. B. 488, C. A. Cf. *Brice v. Bonnmater* (1878), 8 Q. B. D. at pp. 580, 581, *per* Brett, L.J.

⁶⁹ *Bence v. Shearman*, [1898] 9 Ch. 582, C. A. Cf. *Davis v. Reilly*, [1898] 1 Q. B. 1, cited at p. 124.

⁷⁰ Williams on Executors, 12th ed., pp. 478—487.

⁷¹ *Miller v. Miller* (1785), 3 P. Wms. 856; 24 E. R.

⁷² *Veal v. Veal* (1859), 27 Beav. 803; 54 E. R.; *Austin v. Mead* (1880), 15 Ch. D. 651; *Clement v. Cheeseman* (1884), 27 Ch. D. 681.

⁷³ *Tate v. Hilbert* (1798), 4 Bro. C. C. 286; 29 E. R.; *Holliday v. Atkinson* (1826), 5 B. & C. at p. 503; 108 E. R.; cf. *Re Whitaker* (1889), 42 Ch. D. 119, at p. 124.

⁷⁴ *Re Dillon* (1890), 44 Ch. D. 76, C. A.; *Re Wasserberg*, [1915] 1 Ch. 195 (bearer bonds in box at bank, delivery of key to wife).

afterwards takes them back merely for safe custody, and retains them till he dies. This is a valid gift.⁷⁵

It is clear that the gift of a bill or note does not create a debt against the donor; but is this the principle of a *donatio mortis causa*? The law as to the gift of bills and notes made by the donor requires reconsideration.⁷⁶ Most of the recent cases have arisen on cheques where the peculiar relations of banker and customer complicate the matter: see notes to s. 75 (2). *Quære*, in Illustration 2, must D sue on the bill in the name of C's executor, or can he compel C's executor to indorse the bill to him as he could if he had given value? A gift made by a person who contemplates suicide, and does commit suicide, is not valid as a *donatio mortis causa*.⁷⁷

⁷⁵ *Re Hawkins*, [1924] 2 Ch. 47.

⁷⁶ Cf. Williams on Executors, *supra*. Cf. *Re White*, [1928] W. N. 182 (a post-dated cheque returned by the donor's bank because it is so post-dated is not a valid *donatio*) with *Darlou v. Sparks*, [1938] 2 A. E. R. 255, and *Delgoffe v. Fader*, [1939] 3 A. E. R. 682.

⁷⁷ *Re Dudman*, [1925] 1 Ch. 558.

General Duties of the Holder

[When a party to a bill is discharged from his liability thereon by reason of the holder's omission to perform his duties as to presentment for acceptance or payment, protest, or notice of dishonour, such party, it seems, is also discharged from liability on the debt or other consideration for which the bill was given.⁷⁸ The holder's omission, without lawful excuse, to perform his duties with reference to a bill, is commonly called "laches."⁷⁹ As the Crown can do no wrong, so also it cannot be guilty of laches. The duties in question are not absolute duties, but, throughout the Act, the holder is required to use reasonable diligence in order to fulfil them.]

When presentment for acceptance is necessary.

39. (1) Where a bill is payable after sight,⁸⁰ presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(8) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.⁸¹

Sub-s. 2 settled a doubtful point. Sub-s. 8 is declaratory.⁸²

Where presentment is optional, the object of presenting is (1) to obtain the acceptance of the drawee, and thereby secure his liability as a party to the bill; (2) to obtain an immediate right of recourse against antecedent parties in case the bill is dishonoured by non-acceptance. An agent is bound to use due diligence in presenting for acceptance, even when presentment is optional for the purposes of the Act, and he is liable to his principal for damage resulting from

⁷⁸ See, e.g., *Souard v. Palmer* (1818), 8 Taunt. 277, 129 E. R.; *Peacock v. Purcell* (1863), 32 L. J. C. P. 266, presentment for payment; *Bridges v. Berry* (1810), 3 Taunt. 180; 138 E. R., and *Peacock v. Purcell*, *supra*, as to notice of dishonour; cf. also, *Crowe v. Clay* (1854), 9 Exch. 604; 156 E. R., Ex. Ch. (lost bill); Daniel, 4th ed., § 1276; Chitty, 11th ed., p. 318; Story, § 109. But see note, pp. 318, 311. Must the party discharged be prejudiced by the omission? If the answer is in the negative, it is submitted that the rule is grossly unjust, and out of keeping with modern legal thought (cf. by analogy, *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A. C. 1).

⁷⁹ Cf. *Turner v. Haydon* (1825), 1 B. & C. at p. 2; 107 E. R., *per* Abbott, C.J.

⁸⁰ See s. 40 as to bills payable after sight.

⁸¹ New York Negotiable Instruments Law, § 240, overriding, it seems, *Walker v. Stetson* (1869), 2 Amer. R. 405. French law appears to coincide with the English Act, see Nougier, § 1008.

⁸² Cf. *Ramchurn Mullick v. Luchmesschund Radakissen* (1854), 9 Moore P. C. at pp. 65, 66; 14 E. R.; German Exchange Law, Arts. 19 and 24.

his negligence.⁸³ A bill in the form "Pay without acceptance" is valid.⁸⁴ Bills in this form are said to be common in the French wine trade.

Subject to s. 40 (2) the question of due presentment is only material when acceptance cannot be obtained. If acceptance is obtained, the informality of the presentment is immaterial. There is very little English authority on the subject; rules as to presentment for payment necessarily differ in some respects from rules as to presentment for acceptance (cf. s. 45 with s. 41).

Domiciled bill coming forward late.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.⁸⁵

This sub-section, which is rendered necessary by sub-s. 2, was added in committee. It settled a moot point, and perhaps alters the law. Suppose a bill, payable one month after date, is drawn in New York on a Liverpool firm, but payable at a London Bank. It only reaches the English holder, or his agent, on the day that it matures. He must, nevertheless, present it for acceptance to the drawees in Liverpool. The Act provides that he shall not be prejudiced by so doing. Before the Act the usual practice was to protest the bill in London without any presentment to the drawees—an obviously inconvenient mode of proceeding, for the holder's object is to get the bill paid, and not to run up expenses against the drawer and indorsers.

Time for presenting bill payable after sight.

40. (1) Subject to the provisions of this Act,⁸⁶ when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

⁸³ Pothier, No. 128; Nougier, § 462; *Allen v. Suydan* (1828), 20 Wen 821, New York, as to date bills; see *Bank of Van Diemen's Land v. Victoria Bank* (1871), L R 3 P C at p 542 (after sight bill).

⁸⁴ *R v Kinnear* (1898), 2 M & R 117; 174 E R.; *Miller v Thomson* (1841), 3 M. & Gr. 576; 133 E R.; Nougier, § 470.

⁸⁵ New York Negotiable Instruments Law, § 244.

⁸⁶ For the provisions referred to, see s. 41 (2), which deals with the excuses for non-presentment.

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged.⁸⁷

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

ILLUSTRATIONS

1. A in Windsor draws a bill on B in London, payable one month after sight. The holder keeps it for four days before presenting it for acceptance. It is then dishonoured. This may not be an unreasonable delay.⁸⁸

2. A in London draws a bill on B in Rio, payable sixty days after sight. The payee holds it back for four months, during which time Rio bills are at a discount. He then negotiates it. This may not be an unreasonable delay.⁸⁹

3. A in Newfoundland draws a bill (*in a set*) on B in London, payable ninety days after sight. The payee holds it back for two months, and then forwards it for presentment. No reason for holding back is shown. This may be an unreasonable delay.⁹⁰

4. A in Calcutta draws a bill on B in Hong Kong, payable sixty days after sight. The holder retains it for five months, during which time China bills are at a discount. He then negotiates it. This may be an unreasonable delay.⁹¹

5. A draws a bill on B, payable to C three months after sight. C holds it back for an unreasonable time. He then presents it, and it is accepted. Before it is due the acceptor fails. A is (probably) discharged.⁹²

Reasonable time is a mixed question of law and fact, and in determining it regard must be had to the interests of the holder as well as to the interests of the drawers and indorsers.⁹³ *Qu.*, what, if any, is the liability of a person who retains a bill an unreasonable time and then negotiates it without indorsement? Again, does not negotiation within a reasonable time, *toties quoties*, excuse presentment, or is there any limit? Under the continental codes fixed limits of time for presentment are laid down. The effect of this conflict of laws has not been considered.

Rules as to presentment for acceptance, and excuses for non-presentment.

41. (1) A bill is duly presented for acceptance which is presented in accordance with the following rules⁹⁴ :

⁸⁷ New York Negotiable Instruments Law, § 241.

⁸⁸ *Fry v. Hill* (1817), 7 Taunt. 397; 129 E. R.; cf. *Shute v. Robins* (1828), 2 C. & P. 80; 172 E. R.

⁸⁹ *Mellish v. Rawdon* (1882), 9 Bing. 416; 181 E. R.

⁹⁰ *Straker v. Graham* (1889), 4 M. & W. 721; 150 E. R.

⁹¹ *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore P. C. 46; 14 E. R.; cf. *Godfray v. Coulman* (1859), 18 Moore P. C. 11; 15 E. R.

⁹² *Straker v. Graham* (1889), 4 M. & W. 721 (action for freight for which bill had been given).

⁹³ *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore P. C. 46; *Wallace v. Agry* (1827), 4 Mason 836, Sup. Ct. U. S., per Story, J.

⁹⁴ Cf. New York Negotiable Instruments Law, §§ 242, 243.

- (a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue :

By whom.—"Holder" is defined by s. 2; he is not necessarily the lawful holder.⁹⁵ In an unreported case, in December, 1870, the Court of Appeal dissolved an injunction restraining the drawee from accepting a bill where the holder was alleged to have obtained it by fraud⁹⁶; it seems obvious that the proper course would have been to proceed against the holder.

The holder need not present personally. Bills are constantly forwarded, unindorsed, to an agent for him to procure acceptance. The agent is bound to exercise due diligence in presenting.⁹⁷ "*Ce n'est pas uniquement le porteur qui a qualité pour requérir l'acceptation: cette faculté appartient encore à celui qui en est seulement détenteur*" : Nouguiér, § 462. Presentment for acceptance does not imply any warranty that the bill and documents, if any, attached thereto are genuine.⁹⁸

The presentment, if not made to the drawee, must be made to someone authorised to receive bills for acceptance.⁹⁹ Thus, presentment to a servant who opened the door would not be sufficient; and if a bill is domiciled for payment at a bank, presentment at the bank would not suffice.¹ Putting a bill in the bill box, or giving a bill to a clerk in the office in the usual way is, of course, a presentment to the drawee. As to post office, see s. 41 (1) (e). Reasonable diligence must be used to find the drawee or some person authorised to act for him. When the drawee is a trader it is clear that presentment should be made to him at his place of business if possible.

Day and hour.—As to non-business day, see s. 92. The Bank Holidays Act, 1871 (84 & 85 Vict. c. 17), s. 2, provides that when the day on which a bill should be presented for acceptance is a bank holiday, it is to be presented on the next business day.

"Reasonable hour", in the case of a trader, means business hours, and in the case of a banker banking hours.²

⁹⁵ Cf. *Morrison v. Buchanan* (1888), 6 C. & P. 18; 172 E. R.

⁹⁶ But an injunction will issue to prevent a bank from accepting a bill payable on demand in violation of the statutory privileges of the Bank of England: *Bank of England v. Anderson* (1886), 2 Keen 328; 48 E. R.

⁹⁷ *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 3 P. C. at p. 452; Nouguiér, § 462.

⁹⁸ *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 628, C. A.

⁹⁹ *Cheek v. Roper* (1804), 5 Esp. 176; 170 E. R.

¹ *Obitty on Bills*, 11th ed., p. 196; Netherlands Code, Art. 176.

² Cf. *Parker v. Gordon* (1806), 7 East 385; 108 E. R.; *Elford v. Teed* (1818), 1 M. &

Before maturity.—A bill should clearly be presented for acceptance before maturity.³ It may be accepted when overdue (s. 18). Such acceptance preserves or revives the liability of the drawer and indorsers only in the case provided for by s. 39 (4), *i.e.*, domiciled bill arriving late.

In the case of a bill which is due or payable on demand, presentment for acceptance is merged in presentment for payment. When a bill is presented for payment, the drawee, instead of paying it, often accepts it payable at his bankers. This is, in effect, a kind of payment by cheque,⁴ which the holder perhaps might refuse to take.⁵ Suppose a bill drawn on Edinburgh is accepted payable in London. This is a general acceptance, but it involves presentment in London in order to charge the drawer and indorsers. In New York it has been held that if a bill payable after date be presented on the day it is due and dishonoured, it is immaterial whether it is treated as dishonoured by non-acceptance or non-payment.⁶ Considering the difference in the rules which govern the two kinds of presentment, this might have important consequences.

Two or more drawees.

- (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only :

This sub-section may give rise to a difficulty if one of the drawees refuses to accept, for by s. 19 (2) (e) an acceptance which is not the acceptance of all the drawees is a qualified acceptance. As to the consequences of a qualified acceptance, see s. 44.

Drawee dead.

- (c) Where the drawee is dead presentment may be made to his personal representative⁷ :

Drawee bankrupt.

- (d) Where the drawee is bankrupt, presentment may be made to him or to his trustee⁸ :

S. 38; 105 E. R.; *Baines v. National Provincial Bank* (1927), 96 L. J. K. B. 801, and note to s. 45 (3), p. 142.

³ *O'Keefe v. Dunn* (1815), 6 Taunt. at p. 807; 128 E. R.; Nouguer, § 456.

⁴ *Cf. Bishop v. Chitty* (1742), 2 Stra. 1195; 98 E. R.

⁵ He could most certainly refuse, in the opinion of the present editor.

⁶ *Plato v. Reynolds* (1863), 27 New York R. 586.

⁷ Before this enactment the law on this point was very doubtful. *Smith v. New South Wales Bank* (1872), 8 Moore P. C. (N.S.) 460; 16 E. R., at pp. 461, 462. Now the holder has an option: see sub-s. (2) (a).

⁸ See "bankrupt" defined by s. 2, p. 4. Sub-s. (2) (a) makes the holder's option clear.

Post office.

- (e) Where authorised by agreement or usage, a presentment through the post office is sufficient.⁹

Excuses for non-presentment for acceptance.

(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

- (a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill¹⁰
 - (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected¹¹ :
 - (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.¹²
- (3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Sub-s. 3 is declaratory.¹¹ It, of course, only applies to cases where presentment is obligatory.

Acceptance and payment compared.—Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking generally, presentment for acceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where the money is. Anyone can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present a bill for acceptance. These considerations

⁹ This enactment gives effect to the recognised practice among English merchants. The practice is not recognised by the continental codes.

¹⁰ See "bankrupt" defined by s. 2, p. 4; and as to persons not having capacity to contract by bill, see s. 22. In some copies of the Act the words "or bankrupt" were omitted in error.

¹¹ This is probably declaratory. Cf. *Smith v. New South Wales Bank* (1872), 8 Moore P. C. (N.S.) at pp. 461—463; 17 E. R.; also s. 46 (2) and s. 50 (2).

¹² This is, perhaps, new law, and is important having regard to the next sub-s. Cf. New York Negotiable Instruments Law, § 245.

¹³ *Ex p. Tondeur* (1867), L. R. 5 Eq. at p. 165; *Robinson v. Ames* (1822), 20 John. at p. 149, New York; cf. s. 46 (2) and s. 50 (2).

are material as bearing on the question whether the holder has used reasonable diligence to effect presentment.

Non-acceptance after customary time for consideration.

42. When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

This section was much discussed in committee, and was eventually reduced to its present vague form, as the bankers and merchants took different views as to the exact rights of the parties. The probable effect of it as regards trade bills, is this: If a bill, left for acceptance within business hours one day, is not accepted before the close of business hours on the next day, it must be noted for non-acceptance, or otherwise treated as dishonoured. As to protest for non-delivery, see s. 51 (8).

The practice is usually stated as follows: The person who presents a bill of exchange for acceptance must deliver it up to the drawee if required so to do. The drawee is entitled to retain it for twenty-four hours, but after the expiration of this time he must redeliver it accepted or unaccepted.¹⁴ In reckoning the twenty-four hours non-business days must be excluded.¹⁵ The New York Negotiable Instruments Law, § 224, provides that "the drawee is allowed 24 hours after presentment in which to decide whether or not he will accept the bill, but the acceptance if given dates as of day of presentation".

In a case in 1818, Bayley, J., says: "When a bill is, in the usual course of business, left for acceptance, it is the duty of the party who leaves it to call again for it, and to inquire whether it has been accepted or not. It is not the duty of the other person to send it to him, unless there is a usual course of dealing between the individuals concerned so to do". He then proceeds to decide what the Act now makes clear, *viz.*, that the destruction of the bill by the drawee does not amount to an acceptance.¹⁶ The holder's remedy is an action for damages.

¹⁴ *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 8 P. O. at pp. 542, 543; Story, § 237; French Code, 125; Nougner, § 587. But see Brooks' Notary, 6th ed. p. 78, as to alleged practice when it is thought unsafe to leave the bill with the drawee. The holder, after exhibiting the bill to him, leaves a formal notice that the bill lies for acceptance at a specified address. The Act leaves this point open, as also does the New York law.

¹⁵ *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 8 P. O. at pp. 546, 547, as to the effect of a short day—*e.g.*, Saturday; and see s. 92.

¹⁶ *Jeans v. Ward* (1818), 1 B. & Ald. 658, at p. 659; 106 E. R. Under § 225 of the New York Negotiable Instruments Law, if the drawee wrongly retains or destroys the bill he is deemed to have accepted it.

Dishonour by non-acceptance and its consequences.

43. (1) A bill is dishonoured by non-acceptance—

- (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or
- (b) when presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act¹⁷ when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.¹⁸

As to the presentment for acceptance, see s. 41; for the requisites of a valid acceptance, see ss. 17 and 19. By s. 44 (1), the holder has an option to take or refuse a qualified acceptance.¹⁹ See also last section. For excuses for not presenting for acceptance, see s. 41 (2).

According to English law the holder is under no obligation to resort to the case of need, if such there be; but if he does so, and obtains an acceptance for honour, his right of recourse against the drawer and indorsers is suspended. The effect of this suspension on the Statute of Limitations has not been considered.

The immediate right of recourse arising on non-acceptance is an exceptional right,²⁰ and until recently was peculiar to the English and American law.²¹ Under most of the continental codes the holder can only protest the bill for non-acceptance, and demand security from the drawer and indorsers.²² The effect of this conflict of laws does not appear to have been judicially considered.

A bill which has been dishonoured by non-acceptance may subsequently be accepted (see s. 18 (2) and (3)). It seems clear that the holder has an option to allow the bill to be accepted or not.

On non-acceptance the holder has an immediate "right of recourse", that is, "resort", to the drawer and indorsers; but no right of "action" arises until he has performed the conditions precedent by giving notice of dishonour, and protesting, when necessary.

¹⁷ See s. 55 (acceptance for honour).

¹⁸ Cf. New York Negotiable Instruments Law, §§ 246—248.

¹⁹ It has been held in the United States that an agent for collection has *prima facie* no authority to take a qualified acceptance: *Walker v. New York State Bank*, 9 N. Y. Rep. 582.

²⁰ Cf. *Dunn v. O'Keefe* (1816), 5 M. & S. at p. 289; 106 E. R.

²¹ *Whithead v. Walker* (1842), 9 M. & W. at p. 516; 152 E. R.; *Watson v. Turpley* (1855), 20 Hqw. at p. 519, Sup. Ct. U. S.

²² French Code, Arts. 119, 120.

As a general rule, the holder's cause of *action* is not complete until notice of dishonour has been received by the party sought to be charged.²¹

Duties as to qualified acceptances.

44. (1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice²⁴ has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.²⁵

For qualified acceptances, see s. 19. According to the continental codes, it seems that the holder cannot refuse a partial acceptance.²⁶ He can only protest for the balance.

In some trades, such as the East Indian, the practice of accepting against delivery of bills of lading is so common that an authority to take such an acceptance might, perhaps, be implied.²⁷ Sometimes, too, the terms of a documentary bill or credit might be such as impliedly to authorise it.

If the holder takes a qualified acceptance he should give notice, not of dishonour, but of the qualification to prior parties.²⁸

Sub-s. 3 settles a doubtful point in favour of the holder.²⁹

²³ *Castrique v. Bernabo* (1844), 6 Q. B. 498; 115 E. R.; cf. p. 150.

²⁴ Cf. *Sebag v. Abitbol* (1816), 4 M. & S. at p. 466; 108 E. R.

²⁵ Cf. New York Negotiable Instruments Law, § 230, which, however, omits the second paragraph of sub-s. (2).

²⁶ French Code, Art. 124; German Exchange Law, Art. 22.

²⁷ See the form of acceptance in *Ex p. Brett* (1871), L. R. 6 Ch. App. 888.

²⁸ Cf. *Bantinck v. Dorrien* (1805), 6 East 199; 102 E. R.

²⁹ See subject discussed in *Rowe v. Young* (1820), 2 Bligh. 391; 4 E. R., H. L.

Presentment for payment.

45. Subject to the provisions of this Act "a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

By presentment for payment a holder does not thereby warrant the genuineness of the bill.¹¹

A drawer or indorser who is discharged from his liability on the bill, it seems, is also discharged from his liability on the consideration therefor.¹²

The rules applicable to the drawer or indorser of a bill apply equally to the indorser of a note¹³ or cheque, but they do not apply to the maker of a note, who is sometimes called the drawer; and they are modified as to time as regards the drawer of a cheque: s. 74. According to French Code, Art. 161, a bill must be presented for payment on the day it falls due, but it seems no penalty follows the omission to present, provided the bill be duly protested on the following day: *Nougner*, § 1076. Practically, then, protest is substituted for presentment for payment. Again, a distinction is drawn between the drawer and the indorsers. Omission duly to protest discharges the indorsers, but the drawer is not discharged unless he shows affirmatively that the drawee or acceptor had funds to meet the bill.¹⁴

Rules.

A bill is duly presented for payment which is presented in accordance with the following rules:—

At what time.

- (1) Where the bill is not payable on demand, presentment must be made on the day it falls due.¹⁵

¹⁰ See s. 46 for excuses for non-presentment and delay, and s. 39 (4) for the special case of an unaccepted domiciled bill coming forward late.

¹¹ *East India v. Tritton* (1824), 3 B. & C. at p. 289; *Guaranty Trust Co. of N. Y. v. Hannay & Co.*, [1918] 2 K. B. at pp. 681 and 682; *Greenwood v. Martins Bank, Ltd.*, [1938] A. C. 51. Cf. *Gowers v. Lloyds, etc.*, [1938] 1 A. E. R. 766, C. A., and p. 174.

¹² *Peacock v. Purcell* (1868), 32 L. J. C. P. 266. This would seem very doubtful unless the drawer or indorser has suffered damage by the delay (see p. 182 and p. 318).

¹³ Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at pp. 262, 263; 149 E. R., Ex. Ch.

¹⁴ French Code, Arts. 117 and 170; *Nougner*, §§ 1147—1165.

¹⁵ As to calculating the due date, see s. 14. The provision is declaratory: *Philpot v. Brient* (1828), 4 Bing. at p. 720; 130 E. R.; *New York Negotiable Instruments Law*, § 181; French Code, Art. 161; see, e.g., *Wiffen v. Roberts* (1795), 1 Esp. 262; 170 E. R., second day of grace; *Prideaux v. Collier* (1817), 2 Stark. 58; 171 E. R., day after maturity.

- (2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.³⁶

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

As to when a bill is in legal effect payable on demand, see s. 10. This provision is modified by s. 74, as regards the drawer of a cheque. Compare s. 40, as to presentment for acceptance of bill payable after sight. Under the continental codes bills payable at sight must be presented for payment within the like fixed limits of time that bills payable after sight must be presented for acceptance.³⁷ As to notes, see s. 86.

Presentment for payment.

- (3) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.³⁸

By whom.—The acceptor's obligation is to pay the holder—that is, the person who can give a good discharge for the bill.³⁹ As to presentment through the post office, see sub-s. 8. The person who presents a bill for payment must exhibit the bill and be ready and

³⁶ Cf. *Moule v. Brown* (1898), 4 Bing. N. C. 266; 132 E. R., as to a cheque cashed for the bearer; and of New York Negotiable Instruments Law, § 131, and notes in Crawford's edition. The second clause of the sub-s. is confined to bills of exchange.

³⁷ French Code, Art. 160; German Exchange Law, Art. 31.

³⁸ Cf. New York Negotiable Instruments Law, § 132.

³⁹ See s. 52, and cf. *Walker v. Macdonald* (1848), 2 Exch. at p. 582; 154 E. R.; *Cole v. Jessop* (1864), 10 New York R. at p. 100.

willing to deliver it up on receiving payment.⁴⁰ He does not guarantee its authenticity.⁴¹

If the bill be lost, a copy should be presented and an indemnity tendered; but *qu.* as to the sufficiency of this. A protest, it seems, can be made on a copy: s. 51 (8). The provision that the loss of a bill shall not be set up in an action if an indemnity be given hardly seems to meet the present case. As to the parts of a set, see s. 71. As to non-business days, see s. 92.

Day and hour.—The reasonableness of the hour must depend on whether the bill is payable at a place of business or at a private house. The payor is not bound to stay at his place of business after a reasonable hour. If a bill be payable at a bank, it must be presented within banking hours⁴²; if at a trader's place of business, then within ordinary business hours⁴³; if at a private house, probably a presentment up to bed-time would be sufficient.⁴⁴

In America presentments at 8 a.m. and 11 p.m. have been held unreasonable: *Daniel*, § 348. Before the Act, it was held that if a bill was presented at an unreasonable hour, but payment was refused on some other ground, the presentment was good.⁴⁵ The same rule may still be applicable: see note, p. 146.

To whom.—Speaking generally, it is the duty of the payor to have the money ready on the appointed day at the appointed place, and if the holder after the exercise of reasonable diligence cannot find any such person there, he has done all that is required of him⁴⁶: see sub-s. 5.

Duties of Agent.—A collecting agent is, of course, liable to his principal if he does not use due diligence in presenting a bill for payment and take the proper proceedings on dishonour.⁴⁷ The

⁴⁰ S. 52 (4); cf. *Griffin v. Weatherby* (1868), L. R. 3 Q. B. at pp. 760, 761.

⁴¹ *Guaranty Trust Co. of New York v. Hannay* (1918), 28 Com. Cas. at p. 402, C. A.; [1918] 2 K. B. 623, 632, C. A. See p. 141.

⁴² *Elford v. Teed* (1818), 1 M. & S. 28; 105 E. R.; *Parker v. Gordon* (1806), 7 East 386; cf. *Whitaker v. Bank of England* (1895), 1 C. M. & R. 750; 149 E. R. As to what are banking hours for payment of a cheque, see *Baines v. National Provincial Bank* (1927), 98 L. J. K. B. 801.

⁴³ Cf. *Allen v. Edmundson* (1848), 2 Exch. at p. 723; 154 E. R.; *Morgan v. Davison* (1815), 1 Stark. 114; 171 E. R. (time 6.30 p.m.); *Barclay v. Basley* (1810), 2 Camp. 527; 170 E. R. (time 8 p.m.). Have not business hours changed since then?

⁴⁴ *Triggs v. Newnham* (1826), 10 Moore 249; 14 E. R. (time 8 p.m.); *Wilkins v. Jades* (1891), 2 B. & Ad. 188; 109 E. R.

⁴⁵ *Henry v. Lee* (1820), 2 Chitty 124; *Garnett v. Woodcock* (1817), 6 M. & S. 44; 105 E. R.

⁴⁶ *De Bergarsche v. Pillin* (1826), 3 Bing. 476; 130 E. R.; *Wilmot v. Williams* (1844), 7 M. & Gr. 1017; 135 E. R.; cf. *Butterworth v. Le Despencer* (1814), 3 M. & S. 160; 105 E. R.; *Startup v. Macdonald* (1843), 6 M. & Gr. at p. 824.

⁴⁷ Cf. *Lubbock v. Tribe* (1898), 3 M. & W. at p. 621; 150 E. R.; *Lysaght v. Bryant* (1850), 19 L. J. C. P. at p. 160, Maule, J.; and see *Deverill v. Burnell* (1878), L. R. 3 C. P. 476 (measure of damage); *Paget on Banking*, 4th ed., p. 290.

same rule applies to a pledgee or person holding a bill as collateral security.¹⁸ An agent is, as a rule, responsible for the default of a sub-agent whom he employs; but in some of the American States an exception is admitted when the sub-agent is a notary, on the ground that he is a public officer.¹⁹

At what place.

(4) A bill is presented at the proper place :—

(a) Where a place of payment is specified in the bill and the bill is there presented.

The place of payment may be specified either by the drawer,²⁰ or by the acceptor.²¹ If alternative places of payment are specified, presentment at either place is sufficient.²²

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.²³

(c) Where no place of payment is specified, and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence if known.²⁴

(d) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.²⁵

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found

¹⁸ *Peacock v. Purcell* (1863), 82 L. J. C. P. 266.

¹⁹ *Daniel*, § 843, *Parsons*, p. 480; cf. *Paget*, 2nd ed., p. 288.

²⁰ *Gibb v. Mather* (1832), 2 Cr. & J. 254; 149 E. R.; *Bank Polska v. K. J. Mulder & Co.*, [1842] 1 K. B. 497; *Walker v. Stetson* (1869), 2 Amer. R. 406; German Exchange Law, Art. 42.

²¹ *Saul v. Jones* (1856), 28 L. J. Q. B. 37.

²² *Beeching v. Gower* (1816), Holt N. P. C. 818; 171 E. R.; cf. *Pollard v. Herries* (1803), 3 B. & P. 335; 127 E. R.

²³ See *Hine v. Allely* (1833), 1 N. & M. 433; *Buxton v. Jones* (1840), 1 M. & Gr. 83, 133 E. R.

²⁴ See *Shiel v. Britt* (1823), 18 Mass. 412; *Meyer v. Hibsher* (1872), 47 New York R. at p. 270; *Gross v. Smith* (1813), 1 M. & S. at p. 554.

²⁵ See *King v. Crowell* (1873), 14 Amer. R. 580; New York Negotiable Instruments Law, § 133.

there, no further presentment to the drawee or acceptor is required.

ILLUSTRATIONS

1 A bill is accepted Payable at 1, Duke Street, London'' The acceptor dies Presentment at 1 Duke Street is sufficient, without making search for the acceptor's executor.⁵⁶

2 The acceptor of a bill accepts it payable at his banker's The bill must be presented at the bank A presentment to the acceptor personally is insufficient.⁵⁷

3 A bill is addressed to Mr B, Duke Street, London B accepts it generally The bill is presented at 1 Duke Street, and the house is found shut up This is sufficient.⁵⁸

4 A bill is addressed to Mr B, 1, Duke Street, London'' B accepts it generally The holder takes the bill to 1 Duke Street, and inquires for B A woman living in the house informs him that B has left This is sufficient.⁵⁹

5 A bill is accepted payable at a bank When the bill matures the bank is the holder of the bill, but the acceptor has no assets there This is sufficient No personal demand on the acceptor is necessary.⁶⁰

6 A bill is accepted payable at a bank. If the bill is presented to a clerk or agent of the bank at the *Clearing House*, that is a presentment to the bank and sufficient.⁶¹

Clearing House.—As to the practice of the Clearing House, see *The Bankers' Clearing House*, by P. W. Matthews. The amount represented by bills and cheques cleared in 1926 was nearly forty thousand millions (£39,825,054,000).

Two or more drawees.

- (6) Where a bill is drawn upon or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

This is probably declaratory,⁶² but the point was not clear. Of course, if one pays, or in refusing payment acts as the agent of the others, that is enough.

⁵⁶ *Philpot v. Briant* (1827), 3 C. & P. 244; 172 E. R.; cf. *Wilkins v. Jades* (1831), 2 B. & Ad. 188; 109 E. R.

⁵⁷ *Gibb v. Mather* (1832), 2 Cr. & J. 254; 149 E. R., Ex. Ch.; *Saul v. Jones* (1858), 28 L. J. Q. B. 37.

⁵⁸ *Hins v. Allely* (1838), 4 B. & Ad. 624; 110 E. R.; cf. *Crosse v. Smith* (1813), 1 M. & S. at p. 554; 105 E. R.

⁵⁹ *Burton v. Jones* (1840), 1 M. & Gr. 88; 189 E. R.

⁶⁰ *Bailey v. Porter* (1845), 14 M. & W. 44; 153 E. R.

⁶¹ *Reynolds v. Chetler* (1811), 2 Camp. 595; 170 E. R.; *Harris v. Parker* (1838), 6 Tyr. 870. As to the practice of the Clearing House and the distinction between London and country cheques, see *Boddington v. Schlenker* (1838), 4 B. & Ad. 752, 110 E. R.; London Clearing House Rules and Regulations, 1921; and Hart's *Law of Banking*, 8th ed., pp. 350 *et seq.*, citing *Parr's Bank v. Ashby* (1898), 14 T. L. R. 563; *Journal of the Institute of Bankers* (1927), vol. 48, p. 79.

⁶² *Union Bank v. Willis* (1844), 49 Massachusetts R. 504; see *Gates v. Beecher* (1875), 60 New York R. 518, as to ex-partners; *Britt v. Lawson* (1878), 22 Hun R. 128, New York, as to joint and several note; New York Negotiable Instruments Law, § 188; cf. a special provision as to partners and ex-partners in § 187.

Drawee or acceptor dead.

- (7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

This is declaratory.⁶¹ See s. 41 (2) (a) for presentment for acceptance, where different considerations apply, and a different rule is accordingly laid down.

Post office.

- (8) Where authorised by agreement or usage a presentment through the post office is sufficient.

This gives effect to a recognised practice in England and the United States.⁶¹

Irregular presentment.—The sufficiency of a presentment depends on whether reasonable diligence has been exercised or not. In America the rule is the same as in England, though perhaps it is rather more laxly applied. See the authorities collected in the note to *Berg v. Abbott*.⁶⁵ In America it has been held that if the payor has a known residence a presentment to him in the street is insufficient unless he waive the irregularity and refuse payment on some other ground,⁶⁶ and further that where no place of payment is specified in a note all the parties may orally agree upon a place, and that a presentment there is sufficient to charge the indorser.⁶⁷ If the payor cannot be found the question is whether due diligence has been used in an endeavour to find him and make presentment: see s. 46 (2). Most of the foreign codes contain explicit provisions as to what is to be done in that case.⁶⁸

Excuses for delay or non-presentment for payment.

46. (1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default,

⁶¹ *Williams on Executors*, 10th ed. p. 1607; cf. *Caunt v. Thompson* (1849), 7 C. B. 400; French Code, Art. 168; New York Negotiable Instruments Law, § 136.

⁶⁴ See *Heywood v. Pickering* (1874), L. R. 9 Q. B. 428, at p. 432; *Prideaux v. Criddle* (1869), L. R. 4 Q. B. at p. 461; *Windham Bank v. Morton* (1852), 22 Connecticut R. 214; *Paget on Banking*, 2nd ed. p. 291.

⁶⁵ (1877), 24 Amer. B. 158.

⁶⁶ *King v. Holmes* (1849), 11 Pennsylv. R. 456.

⁶⁷ *Meyer v. Hibsher* (1872), 47 New York R. 265.

⁶⁸ See, e.g., German Exchange Law, Art. 91; Netherlands Code, Art. 180.

misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.⁶⁹

ILLUSTRATIONS

1. The holder of a bill dies suddenly just before it matures. The circumstances may be such as to excuse delay.⁷⁰ Possibly also if he be so ill that he is unable to attend to business or give instructions.

2. Bill drawn in England, payable in Leghorn. At the time the bill matures Leghorn is besieged. The holder is not in Leghorn. This excuses delay.⁷¹

3. Bill presented for payment through the post (see s. 45 (8)). It is sent off in time to reach the drawee on the day of maturity, but by mistake of the post office is delayed some days. The delay is (probably) excused.⁷²

4. Bill drawn in England, payable in Paris. By a French moratory law, passed in consequence of war, the maturity of bills payable in Paris is postponed three months. The delay in making presentment is excused.⁷³

The cases do not clearly distinguish between excuses for non-presentment and excuses for delay in presentment, but when the question is one of reasonable diligence the distinction is an important one⁷⁴; the criteria may be different. If presentment is delayed at the request of the drawer or indorser sought to be charged, the delay is presumably excused.⁷⁵

Excuses for non-presentment for payment.

(2) Presentment for payment is dispensed with,—

(a) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.⁷⁶

ILLUSTRATIONS

1. Bill drawn on B is accepted by an agent. At the time the bill matures B is abroad. This is no excuse, presentment should be made to the agent.⁷⁷

⁶⁹ Pothier, No. 144; Nougier, §§ 1107, 1108; Story, § 927; cf. *Rothschild v. Currie* (1841), 1 Q. B. at p. 47; New York Negotiable Instruments Law, § 141.

⁷⁰ Williams on Executors, 10th ed. p. 1585, n.

⁷¹ *Patience v. Townley* (1805), 2 Smith 228.

⁷² *Windham Bank v. Morton* (1852), 22 Connecticut R. 214; *Pier v. Heinrichsoffer* (1877), 29 Amer. R. 501; cf. s. 49 (15).

⁷³ *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; *Re Francke and Rasch*. [1918] 1 Ch. 470 (German Moratory Law).

⁷⁴ *Cf. Allen v. Edmundson* (1848), 2 Exch. at p. 724 (notice of dishonour). Cf. p. 144.

⁷⁵ *Lord Ward v. Oxford Ry.* (1852), 2 De G. M. & G. 750; 42 E. R.

⁷⁶ *Smith v. Bellamy* (1817), 2 Stark. 223; 171 E. R.; New York Negotiable Instruments Law, § 142.

⁷⁷ *Philips v. Astling* (1809), 2 Taunt. 206; 127 E. R.

2 B makes a note "Payable at Guildford". B has no residence there. The bill is presented at two banks, and then treated as dishonoured. This is sufficient.⁷⁸

3. The drawer of a bill orders the acceptor not to pay it. The holder hears of this. Presentment is not dispensed with.⁷⁹

4. The acceptor of a bill informs the holder that he cannot, or will not, pay it when due. Presentment is not dispensed with.⁸⁰

5. The acceptor of a bill becomes bankrupt before it matures. Presentment is not excused.⁸¹

6. B makes a note payable at '1, X Street, London'. Before it becomes due he becomes insolvent and absconds. Presentment at 1 X Street is not dispensed with.⁸²

7. A bill drawn on a bank in Amsterdam was sent by post by the defendants from Yugoslavia to the plaintiff in England. It arrived on May 10, 1940, when Amsterdam was occupied by German armed forces invading Holland. Presentment for payment was excused by s. 46 (2) (a) and the position was unaffected by assuming that even if presentment had been physically possible it would have been illegal (as involving commercial intercourse with an alien enemy) to present the cheque in Amsterdam.⁸³

This sub-section is declaratory.⁸⁴ In some American states there is a tendency to dispense with the attempt to make presentment when it would be futile.⁸⁵ This tendency is of doubtful expediency, and finds no favour in England. Compare s. 46 (5) and s. 50 (2) and notes thereto.

The fact that the drawee is a person not having capacity to contract does not excuse presentment for payment unless the case falls within the next clause, though it does excuse presentment for acceptance: see s. 41 (2).

(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.⁸⁶

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.⁸⁷

⁷⁸ *Hardy v. Woodroffe* (1818), 2 Stark. 319; 171 E. R.

⁷⁹ *Hill v. Heap* (1823), D. & R. N. P. C. 57; cf. *Nicholson v. Gouthut* (1796), 2 H. Bl. 609; 126 E. R.

⁸⁰ *Baker v. Birch* (1811), 3 Camp. 107; 170 E. R.; *Ex p. Bignold* (1836), 1 Deac. 712.

⁸¹ *Beddall v. Sowerby* (1803), 11 East, at p. 117; 103 E. R.; *Bower v. Howe* (1818), 5 Taunt. 30, Ex. Ch.; Pothier, No. 147. *Aliter* as to presentment for acceptance, see s. 41 (2).

⁸² *Sands v. Clarke* (1849), 19 L. J. C. P. 84; *Pierce v. Gate* (1853), 66 Massachusetts R. 190.

⁸³ *Cornelius v. Banque Franco-Serbe*, [1942] 1 K. B. 29.

⁸⁴ Cf. Pothier, Nos. 144-147; *Re East of England Banking Co.* (1868), L. R. 4 Ch. at p. 18; New York Negotiable Instruments Law, § 142.

⁸⁵ See, e.g., *Foster v. Julien* (1861), 24 New York R. 28.

⁸⁶ Cf. New York Negotiable Instruments Law, § 139.

⁸⁷ New York Negotiable Instruments Law, § 140.

ILLUSTRATIONS

1 Bill payable to drawer's order is accepted and indorsed to accommodate the drawer. The drawer discounts it, but does not provide the acceptor with funds to meet it at maturity. Presentment is not necessary to charge the drawer,⁸⁸ but is necessary to charge the accommodation indorser.⁸⁹

2. A cheque is drawn on the Union Bank, the drawer not having sufficient funds there to meet it, and having no reason to expect that it will be honoured. Presentment is not necessary to charge the drawer.⁹⁰

Compare s. 50 (2) (c) and (d), and notes thereto; also *Pothier*, No. 157.

Waiver.

(e) By waiver of presentment, express or implied.⁹¹

Compare s. 50 (2) (b) as to notice of dishonour. The waiver may be either before or after the time for presentment. As to express stipulation in the bill waiving presentment, see s. 16 (2). Waiver of notice of dishonour does not of itself include a waiver of presentment for payment.⁹² German Exchange Law, Art. 42, provides that when the drawer or indorser inserts the term "Protest waived", presentment for payment is not waived thereby, but it lies on such drawer or indorser to prove that the bill has not been duly presented.

See further s. 51 (6) (b) as to protest of bill previously dishonoured by non-acceptance.

Dishonour by non-payment.

47. (1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act,⁹³ when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorser accrues to the holder.

⁸⁸ *Terry v. Parker* (1887), 6 A. & E. 502; 112 E. R.

⁸⁹ *Saul v. Jones* (1856), 28 L. J. Q. B. 37; cf. *Turner v. Samson* (1876), 2 Q. B. D. 23, C. A.

⁹⁰ *Wirth v. Austen* (1875), L. R. 10 C. P. 689; cf. *Re Bethell*, [1887] W. N. p. 17.

⁹¹ *Hopley v. Dufresne* (1812), 15 East 275; 104 E. R.; cf. *Ex p. Bignold* (1836), 1 Deac. at p. 787; *Sheldon v. Horton* (1870), 49 New York R. 98; New York Negotiable Instruments Law, § 142, and cases cited in Crawford's edition.

⁹² *Hill v. Heap* (1823), D. & R. N. P. C. 57; 171 E. R. So held also in Louisiana, *Wilkins v. Dawes* (1862), 20 La. An. 588; *aliter*, in New York, *Caddington v. Davis* (1848), 1 New York R. 187.

⁹³ See ss. 65-68 (acceptance and payment for honour).

ILLUSTRATION

An accepted bill is presented for payment and dishonoured. The holder can at once give notice of dishonour to the drawer and indorsers, but he cannot commence an action against the acceptor till the next day.⁹⁴

This is declaratory.⁹⁵ As a general rule the holder's right of action against a drawer or indorser dates from the time when notice of dishonour is or ought to be received, and not from the time when it is sent⁹⁶; and in any case there is right of action till the day after dishonour. The right of recourse must be distinguished from the right of action.⁹⁷

Presentment for Payment to Charge Stranger to Bill.

Presentment to charge stranger.—Presentment for payment is not generally a condition precedent to the liability of a person who has given a guarantee for the payment of a bill by the acceptor.⁹⁸ The reason is that presentment is not necessary to charge the acceptor or maker: s. 52 (1). If the drawer were the party guaranteed, or, perhaps, if the acceptance were qualified, presentment would be necessary.

A person who is not a party to a bill, but who is liable on the consideration for which it is given is, it seems, discharged by the holder's omission to present it for payment.⁹⁹ The same diligence is not requisite in this case as is necessary to charge a party to the instrument. It is sufficient that the holder does what is reasonable to obtain payment.¹

Notice of dishonour and effect of non-notice.

48. Subject to the provisions of this Act,² when a bill has been dishonoured by non-acceptance or by non-pay-

⁹⁴ *Kennedy v. Thomas*, [1894] 2 Q. B. 759, C. A.; cf. *Galmini v. Moriggia*, [1913] 2 K. B. 549, at p. 552 (Statute of Limitations). The law in the United States appears to be the same.

⁹⁵ *Ex p. Moline* (1812), 1 Rose 303; *Siggers v. Lewis* (1894), 1 C. M. & R. 370; 149 E. R.; New York Negotiable Instruments Law, §§ 143, 144.

⁹⁶ *Castrique v. Bernabo* (1844), 6 Q. B. 498; see note on Statute of Limitations, p. 205. (Cf. *Castrique v. Bernabo*, cited p. 140.)

⁹⁷ *Kennedy v. Thomas*, [1894] 2 Q. B. 759, C. A.

⁹⁸ *Wallon v. Mascall* (1844), 13 M. & W. 452; 153 E. R.; *Nouguier*, § 1192; cf. *Hitchcock v. Humphrey* (1848), 5 M. & Gr. 559; 134 E. R.; *Black v. Ottoman Bank* (1862), 15 Moore P. C. 472, 484; 15 E. R.; *Carter v. White* (1889), 25 Ch. D. 666, C. A.

⁹⁹ *Anderton v. Beck* (1812), 16 East 248; *Hopkins v. Ware* (1869), L. R. 4 Ex. 268; cf. *Straker v. Graham* (1889), 4 M. & W. 721; 150 E. R. (presentment for acceptance). *Qu.* whether this is an absolute rule, or whether the defendant must show that he has been prejudiced by the omission.

¹ *Sands v. Clarke* (1849), 8 C. B. at p. 761; 137 E. R.; *Maule, J.*; *Smith v. N. S. Wales Bank* (1872), 8 Moore P. C. (n.s.) at pp. 461—463; 17 E. R.; *Mellish, L.J.*; *Fee, s.g., Robson v. Oliver* (1847), 10 Q. B. 704, at p. 717; 116 E. R.

² See s. 50 (excuses for non-notice and delay).

ment," notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged'; Provided that—

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course⁴ subsequent to the omission, shall not be prejudiced by the omission.⁵

(2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.⁷

ILLUSTRATION

A bill bearing indorsement is dishonoured, and the holder gives notice of dishonour to the indorser but not to the drawer. If the indorser in turn sends a notice of dishonour to the drawer, the holder can sue both indorser and drawer. If this be not done the holder can sue the indorser, but the indorser cannot sue the drawer.⁸

"Notice of dishonour" means notification of dishonour, *i.e.*, formal notice.⁹ The fact that the drawer or indorser of a bill knows that it has been dishonoured does not dispense with the necessity of giving him notice of dishonour.¹⁰ *Pothier* (No. 147), speaking of protests, lays down a similar rule: "*la raison est que les formalités établies par les lois pour donner à quelqu'un la connaissance de quelque fait, ne se suppléent point, et ne s'accomplissent pas par équipollence*". As regards notes and inland bills, notice of dishonour is the English substitute for protest.¹¹ As regards foreign bills notice of dishonour is supplementary to protest.¹² Under the continental codes notice of protest must be given within fixed limits of time.¹³

⁴ Cf. ss. 43 and 47, defining dishonour by non-acceptance and non-payment.

⁵ *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. at p. 642. New York Negotiable Instruments Law, § 180.

⁶ See s. 29, defining holder in due course.

⁷ *Roscow v. Hardy* (1810), 12 East 434; 104 E. R.; *Dunn v. O'Keeffe* (1816), 5 M. H. 282; 105 E. R. New York Negotiable Instruments Law, § 188.

⁸ New York Negotiable Instruments Law, § 187; *Campbell v. French* (1795), 6 T. R. 200; 101 E. R.

⁹ Cf. *Rickford v. Ridge* (1810), 2 Camp. at p. 538; 170 E. R.; *Miers v. Brown* (1843), 11 M. & W. 372; 152 E. R.; s. 48 (3), (4).

¹⁰ *Burgh v. Legge* (1839), 5 M. & W. at p. 422; 151 E. R.; *Alderson, B.*; *Carter v. Flower* (1847), 16 M. & W. at p. 749; 153 E. R.; *Parke, B.*; cf. *Re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507.

¹¹ *Miers v. Brown* (1843), 11 M. & W. 372; 152 E. R.; *East v. Smith* (1847), 16 L. J. Q. B. 282; cf. *Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

¹² *Solarte v. Palmer* (1833), 7 Bing. at p. 533; 131 E. R.

¹³ *Ex p. Lowenthal* (1874), L. R. 9 Ch. 591. The notice is not bad because it does not state that the bill has been protested.

¹⁴ Cf. French Code, Arts. 166—170; German Exchange Law, Arts. 45—47.

Rules as to notice of dishonour.

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules¹⁴ :—

By whom to be given.

- (1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.¹⁵
- (2) Notice of dishonour may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.¹⁶

ILLUSTRATIONS

1. A bill indorsed by C and held by D is dishonoured. X, who was at one time employed by the drawer to get the bill discounted, but is not in any way acting on D's behalf, informs C that the bill has been dishonoured. This is not sufficient; C is discharged.¹⁷

2. C is the first indorser of a dishonoured bill held by D. D gives notice to C one day late. C, on the same day, gives notice to the drawer; thus, as it were, making up for the lost day. This notice is ineffectual; for C, having been discharged by the holder's delay, is a mere stranger.¹⁸

3. A bill indorsed by C is held by D. D's attorney gives notice of dishonour to the drawer, but by mistake gives it in C's name instead of D's. The notice is sufficient, provided C is liable to D, and has a right of recourse against the drawer.¹⁹

4. C, the indorser of a bill, holds it as agent for the indorsee. C presents it for payment, and it is dishonoured. Notice of dishonour given by C in his own name is sufficient.²⁰

A party entitled to give notice may constitute the drawee or acceptor his agent for the purpose of giving notice of dishonour.²¹

Notice of dishonour may be given by the party entitled to give it, either personally, or by messenger or other agent,²² or through the

¹⁴ The fifteen rules which follow are declaratory, except that rules 5 and 6 somewhat modify the stringency of the common law. Cf. *Biokerdike v. Bollman*, 1 Smith Lead. Cas. (11th ed.) and notes thereto.

¹⁵ See *Chapman v. Keane* (1835), 3 A. & E. 198; 111 E. R.; Story, § 804; cf. *Harrison v. Ruscoe* (1846), 15 M. & W. at pp. 284, 286; 153 E. R.; cf. New York Negotiable Instruments Law, § 161.

¹⁶ Cf. *Harrison v. Ruscoe* (1846), 15 M. & W. at p. 285; 153 E. R.; New York Negotiable Instruments Law, § 162.

¹⁷ *Stewart v. Kennett* (1800), 2 Camp. 177; 170 E. R.; cf. *East v. Smith* (1847), 16 L. J. Q. B. 262.

¹⁸ *Turner v. Leech* (1821), 4 B. & Ald. 451; 106 E. R.

¹⁹ *Harrison v. Ruscoe* (1846), 15 M. & W. 281; 153 E. R.

²⁰ *Lysaght v. Bryant* (1850), 19 L. J. C. P. 160.

²¹ *Rosher v. Kieran* (1814), 4 Camp. 87; 171 E. R., as modified by *Harrison v. Ruscoe* (1846), 15 M. & W. at p. 285; 153 E. R.; cf. *Radley v. Bodenham* (1864), 33 L. J. C. P. at p. 265, Erie, J.; see *Stanton v. Blossom* (1817), 14 Massachusetts R. 116, where drawee had no authority, and notice was held bad.

²² Cf. *Pearson v. Crallan* (1805), 2 Smith 404, as to messenger's expenses.

post office.²³ By sub-s. 15, when notice of dishonour is sent by post the sender is not prejudiced by the delay or default of the post office, but is deemed to have given due notice of dishonour.²⁴ It lies on the sender to prove that the letter containing the notice was duly addressed and posted.²⁵ The sufficiency of the direction on the letter is a question of reasonable diligence. If the drawer or indorser has a place of business the notice should be addressed to him there; if he has not, then it should be addressed to him at his residence, and the party giving notice is bound to use reasonable diligence to discover such place of business or residence.²⁶ When, however, the bill contains an address, it seems that such address is in any case sufficient to charge the party giving that address.²⁷ German Exchange Law, Art. 47, provides that when an indorser does not state his address notice may be sent to the indorser who precedes him. When a bill is presented for payment through the post office (see s. 45 (8)), the drawee or acceptor is deemed to be the agent of the holder (and not of the drawer or previous indorsers) for the purpose of giving notice of dishonour.²⁸ If the holder does not promptly get an answer from the drawee, it would be prudent for him at once to give notice of dishonour himself.

For whose benefit notice enures.

- (3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders, and all prior indorsers who have a right of recourse against the party to whom it is given.²⁹
- (4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided,³⁰ it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.³¹

²³ *Stocken v. Collin* (1841), 7 M. & W. 515; 151 E. R.

²⁴ *Woodcock v. Houldsworth* (1846), 16 M. & W. 124; 153 E. R. (delay); *Mackay v. Judkins* (1858), 1 F. & F. 208; 175 E. R. (loss), Byles, J.; *Renwick v. Tighs* (1860), 8 W. R. 391 (loss).

²⁵ *Hawkes v. Salter* (1828), 4 Bing. 715; 132 E. R.; cf. *Skilbeck v. Garbett* (1845), 7 Q. B. 846; 115 E. R.

²⁶ *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. 639.

²⁷ *Burmester v. Barron* (1852), 17 Q. B. 828; 117 E. R.; cf. *Ex p. Baker* (1877), 4 Ch. D. at p. 790, C. A.

²⁸ Cf. *Bailey v. Bodenham* (1864), 33 L. J. C. P. at p. 255; *Prideaux v. Criddle*, L. R. 4 Q. B. at p. 461; *Heywood v. Pickering* (1874), L. R. 9 Q. B. 428. But cf. *Clode v. Bayley* (1849), 12 M. & W. 51, cited p. 159.

²⁹ See *Stafford v. Gates* (1820), 18 Johns. 527, New York; New York Negotiable Instruments Law, § 163.

³⁰ See sub-s. (1) and *Turner v. Leach* (1821), 4 B. & Ald. 451; 106 E. R.

³¹ *Chapman v. Keane* (1855), 3 A. & E. 193; 111 E. R.; *Lyssaght v. Bryant* (1850), 19 L. J. C. P. 180; *Streeter v. Fort Bank* (1866), 34 New York R. 413; New York Negotiable Instruments Law, § 164.

In what manner to be given.

- (5) The notice may be given in writing or by personal communication, and may be given in any terms³² which sufficiently identify the bill,³³ and intimate that the bill has been dishonoured by non-acceptance or non-payment.³⁴

ILLUSTRATIONS

1. "I give notice that a bill, etc. (description), indorsed by you, lies at 1, X Street, dishonoured." Sufficient.³⁵
2. The holder's clerk wrote to an indorser that "B's acceptance due that day was unpaid, and requested his immediate attention to it". Sufficient.³⁶
3. "Your draft which became due yesterday is unpaid. Unless the same is paid immediately, I shall take proceedings. Noting 5s." Sufficient.³⁷
4. The following notice left at the drawer's counting-house by the holder's clerk: "B's acceptance to A, £50, due January 1, is unpaid. Payment to D is requested before 4 p.m." Sufficient.³⁸
5. "D. Bank. I beg to intimate that B's acceptance to you due January 1 is still unpaid, and I have to request your immediate attention to the same." No signature. Sufficient.³⁹
6. Notice to drawer of bill accepted by B. "Yours and B's note of hand is now due, and your attention to the same will oblige." Sufficient.⁴⁰

This sub-section originally ended with the words "and that the party to whom notice is given is held liable". These words were struck out in committee. Notices of dishonour are now construed very liberally. In 1884 the House of Lords, in *Solarite v. Palmer*,⁴¹ decided that the notice must inform the holder, either in terms or by necessary implication, that the bill had been presented and dishonoured. This inconvenient decision was frequently regretted,⁴² and was eventually got rid of by considering it merely as a finding on the particular facts.⁴³ Since 1841⁴⁴ it does not appear that any

³² *Caunt v. Thompson* (1849), 18 L. J. C. P. at p. 127; see also sub-s. (7) and note thereto.

³³ *Shelton v. Braithwaite* (1841), 7 M. & W. 436; 151 E. R.; *Gates v. Beecher* (1875), 60 New York R. at p. 527.

³⁴ *Everard v. Watson* (1858), 1 E. & B. at p. 804; 118 E. R., per Ld. Campbell; New York Negotiable Instruments Law, § 167. The notices need not expressly state that the bill has been presented and dishonoured (*Paul v. Joel* (1859), 28 L. J. Ex. 143), nor that it has been protested, if protest be necessary (*Ex p. Lowenthal* (1874), L. R. 9 Ch. 591).

³⁵ *King v. Bickley* (1842), 2 Q. B. 419; 114 E. R.

³⁶ *Bailey v. Porter* (1845), 14 M. & W. 44; 153 E. R. (notice lost, and secondary evidence given of contents).

³⁷ *Armstrong v. Christiani* (1848), 5 C. B. 687; 136 E. R.; *Everard v. Watson* (1858), 1 E. & B. 801; 118 E. R.

³⁸ *Paul v. Joel* (1858), 27 L. J. Ex. 380; affirmed (1859), 28 L. J. Ex. 143.

³⁹ *Maxwell v. Brain* (1864), 10 L. T. 301.

⁴⁰ *Bain v. Gregory* (1866), 14 L. T. 601.

⁴¹ (1884), 1 Bing. N. C. 194; 181 E. R.

⁴² See, e.g., *Everard v. Watson* (1858), 1 E. & B. at p. 804.

⁴³ *Paul v. Joel* (1858), 27 L. J. Ex. at p. 384.

⁴⁴ See *Furze v. Sharrowood* (1841), 2 Q. B. 388; 114 E. R., where the notice would now probably be sufficient.

written notice of dishonour has been held bad on the ground of insufficiency in form.

Forms of notice of dishonour are given in the Appendix (p. 384).

- (6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

This sub-section approves a common practice of collecting bankers which was previously of doubtful validity.

Form.

- (7) A written notice need not be signed,⁴⁵ and an insufficient written notice may be supplemented and validated by verbal communication.⁴⁶ A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.⁴⁷

ILLUSTRATIONS

1. A person sent by the holder goes to the house of the drawer, who is not a trader, and not finding the drawer, informs his wife that he has brought back the bill dishonoured. The wife says she will tell her husband. This may be sufficient.⁴⁸

2. The holder's clerk goes to the drawer and tells him that his bill has been presented, and that the acceptor cannot pay it. The drawer replies that he will see the holder about it. This may be sufficient.⁴⁹

3. A notary's clerk takes the bill, with the notary's ticket attached, to the drawer's office, and shows it to a clerk there. The clerk looks at it, says the drawer is out and has left no orders. The notary then leaves the usual notice that the bill is due at his office. This may be sufficient.⁵⁰

4. A notice to the drawer which describes the bill as payable at the "S. Bank", when in fact it was payable at the "T. Bank",⁵¹ or which describes a bill of exchange as a note,⁵² or which transposes the names of drawer and acceptor,⁵³ or which describes the acceptor by a wrong name,⁵⁴ may be sufficient.

⁴⁵ *Maxwell v. Brain* (1864), 10 L. T. 301; but it must come from the right person (see sub-ss. (1) and (3)).

⁴⁶ *Houlditch v. Cauty* (1898), 4 Bing. N. C. 411, at p. 419; 132 E. R. The sufficiency or insufficiency in such case is a question of fact (*ibid.*); and see *Metcalf v. Richardson* (1852), 11 C. B. 1011; 138 E. R., as to verbal notice.

⁴⁷ New York Negotiable Instruments Law, § 167, and cases in Crawford's edition.

⁴⁸ *Housego v. Cowne* (1837), 2 M. & W. 348; 150 E. R.

⁴⁹ *Metcalf v. Richardson* (1852), 11 C. B. 1011; 138 E. R.

⁵⁰ *Viale v. Michael* (1874), 30 L. T. 453. For further illustrations, see *East v. Smith* (1847), 16 L. J. Q. B. 292; *Chard v. Fox* (1849), 14 Q. B. 200; 117 E. R.; *Jennings v. Roberts* (1855), 24 L. J. Q. B. 102.

⁵¹ *Bromage v. Vaughan* (1846), 16 L. J. Q. B. 10.

⁵² *Stackman v. Parr* (1848), 11 M. & W. 809; 152 E. R.; *Bain v. Gregory* (1866), 14 L. T. 501.

⁵³ *Mellersh v. Rippen* (1852), 7 Exch. 578; 155 E. R.

⁵⁴ *Harpham v. Child* (1859), 1 F. & F. 652; 175 E. R.

To whom notice of dishonour must be given.

- (8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.⁵⁵

ILLUSTRATIONS

1. C is the indorser of a bill which is dishonoured. Verbal notice given to his solicitor is insufficient.⁵⁶
2. X, who has authority to indorse for C, indorses a bill in C's name. Notice of dishonour given to X is (perhaps) sufficient.⁵⁷
3. The drawer of a bill is a non-trader. Verbal notice of dishonour given to his wife at his house, in his absence, may be sufficient.⁵⁸
4. The indorser of a bill is a merchant. Notice of dishonour, verbal or written, given to or left with a clerk at his counting-house is sufficient.⁵⁹
5. C indorses a bill "In need at Messrs. X & Co." Notice of dishonour given to X & Co. is insufficient to charge C.⁶⁰

It is the duty of the drawer or indorser of a bill, if he be absent from his place of business or residence, to see that there is someone there to receive notice on his behalf.⁶¹

- (9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

This is probably declaratory, though there was no English decision in point. It has been held in New York that notice sent to an indorser in ignorance of his death is sufficient.⁶² The Act appears to affirm this view.

- (10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.⁶³

⁵⁵ New York Negotiable Instruments Law, § 168.

⁵⁶ *Grosse v. Smith* (1813), 1 M. & S. at p. 554; 105 E. R.

⁵⁷ Cf. *Firth v. Thrush* (1828), 8 B. & C. at p. 391; 108 E. R.

⁵⁸ *Hausego v. Cowne* (1837), 2 M. & W. 848; 160 E. R.; cf. *Wharton v. Wright* (1844), 1 C. & K. 585.

⁵⁹ *Allen v. Edmundson* (1848), 2 Exch. at p. 724; 154 E. R.; *Viale v. Michael* (1874), 80 L. T. 453.

⁶⁰ *Ex p. Prange, re Leeds Bank* (1866), L. R. 1 Eq. at p. 6.

⁶¹ Cf. *Allen v. Edmundson* (1848), 2 Exch. at p. 728; 154 E. R.

⁶² *Merchants Bank v. Birch* (1817), 17 Johns. R. 24; cf. New York Negotiable Instruments Law, § 169, which reproduces sub-s. (9) and adds, "If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased".

⁶³ Cf. New York Negotiable Instruments Law, § 172, which is rather wider. See "bankrupt" defined by s. 2.

- (11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.⁶⁴

If a bill drawn before dissolution of partnership is dishonoured after dissolution, notice to the continuing partner is sufficient to charge the retiring partner.⁶⁵

Within what time notice of dishonour must be given.

- (12) The notice may be given as soon as the bill is dishonoured,⁶⁶ and must be given within a reasonable time thereafter.⁶⁷

In the absence of special circumstances,⁶⁸ notice is not deemed to have been given within a reasonable time, unless—

- (a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill⁶⁹;
- (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day,⁷⁰ and if there be no such post on that day then by the next post thereafter.⁷¹

Reasonable time will, as heretofore, be a mixed question of law and

⁶⁴ Cf. New York Negotiable Instruments Law, §§ 170, 171.

⁶⁵ *Goldfarb v. Bartlett*, [1920] 1 K. B. 689.

⁶⁶ *Burbridge v. Mannors* (1812), 3 Camp. 198; 170 E. R.; *Hine v. Allday* (1888), 4 B. & Ad. 624; 110 E. R.; *Kennedy v. Thomas*, [1894] 2 Q. B. 759; 114 E. R.

⁶⁷ *Hirschfeld v. Smith* (1868), L. R. 1 C. P. at p. 351; New York Negotiable Instruments Law, §§ 173, 174, lay down rather a stricter rule.

⁶⁸ See, e.g., *The Elmville* (1904), P. 319 (bill drawn by master of ship and whereabouts of ship not known) As to a Jewish sacred festival, see *Lindo v. Unsworth* (1811), 2 Camp. 601; 170 E. R.

⁶⁹ *Smith v. Mullett* (1809), 2 Camp. 208; 170 E. R.; *Hilton v. Fairclough* (1811), 2 Camp. 632.

⁷⁰ *Williams v. Smith* (1819), 2 B. & Ald. at p. 500; 106 E. R.

⁷¹ *Hawkes v. Saller* (1898), 4 Bing. 715; 180 E. R.; *Carter v. Burley* (1898), 9 New Hamp. R. 558, at p. 570.

fact.⁷² By s. 92, when the time allowed for doing any act is less than three days, non-business days are excluded.⁷³

What is meant by "place" in this section? Are Westminster and Marylebone, Bootle and Liverpool, Salford and Manchester, or Bristol and Bedminster different places? Possibly place means a postal district; it may mean a parish; it seems unlikely that it means a rural or urban district as such, since place in the context of the section was used long before the Public Health Act, 1845. Of the many uses of the term set out in the Oxford Dictionary, the following definition seems the most appropriate here,—“a portion of space in which people dwell together; a general designation for a city, town, village, hamlet, etc.”. Robert Burton said “all places are distant from Heaven alike”, and Shakespeare has told us, “All places that the eye of heaven visits are to a wise man ports and happy havens”. It is probably idle to speculate what meaning the Courts may give to the word “place” in s. 49 (12), s. 51 (6), (7), and s. 67 (2); it is suggested that the context of s. 49 implies a postal district (rather than a commercial community), whilst that of s. 51 suggests a commercial community or area served by a notary or district law society. It is to be noticed that “place” is used obviously in two senses in sub-ss. (6) (a) and (b) and (7) (b).

A person who gives notice to a remote party must give notice within the same limits of time that would suffice in the case of an immediate party.⁷⁴ If the holder fails to give notice to a remote party in due time, he cannot rely on such a notice; but if he has given due notice to his immediate indorser, his rights may yet be saved by notice given by such indorser.

Under French Code, Art. 165, the holder of a dishonoured bill must give notice of protest and commence proceedings within fifteen days of the date of protest, if the drawer or indorser sought to be charged live within five myriametres. Extra time is given for extra distance. Thus, under Art. 166, as modified by the law of May 3, 1862, when a bill is payable in England the holder has one month for giving notice of protest and commencing proceedings against a French drawer or indorser. The notice of protest and the summons (assignation en justice) are usually comprised in one document: Nougier, §§ 1088; 1089. Under German Exchange Law, Art. 45, and several other continental codes, the holder must send off written notice of protest within two days after protest.

⁷² *Hirschfeld v. Smith* (1886), L. R. 1 C. P., at p. 351; cf. *Gladwell v. Turner* (1870), L. R. 5 Ex. at p. 61.

⁷³ Cf. *Wright v. Shawcross* (1819), cited 2 B. & Ald. at p. 501; 106 E. R., as to notice received on a Sunday; and Bank Holidays Act, 1871, s. 2, p. 341.

⁷⁴ *Howe v. Tipper* (1863), 22 L. J. C. P. 185; cf. Nougier, § 1096.

Agents.

- (13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the party liable on the bill or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.⁷⁵

ILLUSTRATIONS

1. A bill payable in London is indorsed in blank by the holder, and deposited with a country banker for collection. The country banker's London agent presents it for payment and gives him due notice of its dishonour. The country banker on the day after the receipt of such notice gives notice to his customer, who in turn gives similar notice to his indorser. This indorser has received due notice.⁷⁶

2. C indorses a bill to the Liverpool branch of the D Bank. The Liverpool branch sends it to the Manchester branch, and the Manchester branch indorses it to the head office in London, who present it for payment. The head office sends notice of dishonour to the Manchester branch, the Manchester branch sends notice to the Liverpool branch, who gives notice to C. Each branch as regards time is to be considered a distinct party.⁷⁷

3. X pays a bill *supra protest* for the honour of C, an indorser, who resides at Bruges, and the same day posts the bill to C. C by return of post sends the bill back to X, who at once gives notice of dishonour to the drawer. Although six days have elapsed since the dishonour, the notice is in time, and X can sue the drawer.⁷⁸

4. A bill bearing several indorsements is sent to a branch bank for collection. The branch bank forwards it to a London bank, who on the day that it is dishonoured, give notice by error to another branch of the forwarding bank. Next day, notice is sent to the right branch bank by wire, and the subsequent notices of dishonour are given in due time. The first indorser of the bill cannot rely on the defence that the first notice of dishonour was out of time.⁷⁹

Remote parties.

- (14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.⁸⁰

⁷⁵ New York Negotiable Instruments Law, § 165.

⁷⁶ *Bray v. Hudson* (1818), 5 M. & S. 68; 105 E. R.; cf. *Firth v. Thrush* (1828), 8 B. & C. 387; 108 E. R.

⁷⁷ *Clode v. Bayley* (1843), 12 M. & W. 51; 152 E. R., approved *Prince v. Oriental Bank* (1878), 3 App. Cas. at p. 382, P. C.

⁷⁸ *Goodall v. Polhill* (1845), 14 L. J. C. P. 146.

⁷⁹ *Fielding & Co. v. Corry*, [1896] 1 Q. B. 268; 118 E. R., C. A.

⁸⁰ See *Wright v. Shawcross* (1819), cited 2 B. & Ald. at p. 501; 106 E. R. (notice received on Sunday); and see p. 158, and New York Negotiable Instruments Law, § 178.

Miscarriage of post office.

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.⁸¹

Excuses for delay in giving notice of dishonour.

50. (1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.⁸²

ILLUSTRATION

Bill drawn by master of ship on his indorsers is dishonoured on Saturday. The holder's banker who presented the bill informs him of this on Monday. The holder takes till Thursday in making inquiries as to where the ship is, and then gives notice to the drawer by registered post. The notice is in time, and the delay caused by making inquiry is excused.⁸³

Compare s. 46 (1) as to delay in presentment for payment, and s. 51 (9) as to delay in protest. If an indorser gives a wrong address, delay caused by his so doing would be excused⁸⁴; and if the holder does not know an indorser's address, delay occasioned by making inquiries would be excused⁸⁵; so, too, by s. 49 (15), delay caused by the default of the post office is excused.

This subsection, which is declaratory,⁸⁶ is an obvious deduction from the general rule that notice of dishonour must be given within a reasonable time. The old system of pleading recognised the distinction between excuses for delay and excuses for non-notice.⁸⁷ When the delay is caused by the negligence of the party to whom notice is sent, it is conceived that, though that party is liable, he himself is out of time and cannot give an effectual notice to antecedent parties.⁸⁸

As to notice to indorser who has indorsed a bill when overdue, see note to s. 10 (2).

⁸¹ See note to sub-s. (2), and cf. New York Negotiable Instruments Law, § 177.

⁸² See *Firth v. Thrush* (1828), 8 B. & C. 887; 108 E. R.; *Gladwell v. Turner* (1870), L. R. 5 Ex. at p. 61; and the notice must be given *before action* (*Studdy v. Beesty* (1889), 60 L. T. 647, C. A.); cf. New York Negotiable Instruments Law, § 184.

⁸³ *The Elmville* (1904), P. 319.

⁸⁴ *Hewitt v. Thompson* (1886), 1 M. & Rob. 541; 174 E. R.; *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. 689.

⁸⁵ *Baldwin v. Richardson* (1828), 1 B. & C. 245; 107 E. R.

⁸⁶ *Studdy v. Beesty* (1889), 60 L. T. 647; [1889] W. N. p. 14, C. A.

⁸⁷ *Allen v. Edmundson* (1848), 2 Exch. at p. 728; 164 E. R.

⁸⁸ Cf. *Shelton v. Braithwaite* (1841), 8 M. & W. at pp. 254, 255; 151 E. R.

When notice of dishonour dispensed with.

(2) Notice of dishonour is dispensed with⁸⁸—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged :

ILLUSTRATIONS

1. The holder of a dishonoured bill goes to the drawer's place of business during business hours to give him notice of dishonour. He finds the place shut, and no one there of whom to make inquiries. This may excuse notice.⁸⁹

2. The holder of a bill duly addresses and posts a notice of dishonour. It is lost in the post. The drawer or indorser to whom it was sent is not discharged.⁹¹

3. The holder of a dishonoured bill does not know the indorser's address. He makes some inquiry, but does not take the steps he reasonably might have done.⁹² The indorser is discharged.⁹³

4. A bill is accidentally destroyed before maturity. The holder gives notice of the fact to the drawer. At maturity the holder cannot obtain payment. He must give notice of dishonour to the drawer.⁹⁴

5. Action by indorsee against drawer. Although the drawer could not be found at the address given, he was subsequently found at another address. Delay in giving notice of dishonour is excused but not the omission to give it when his address was found.⁹⁵

The fact that the drawer or indorser sought to be charged had reason to believe that the bill would, on presentment, be dishonoured, does not dispense with the necessity for giving him notice of dishonour.⁹⁶ Thus, if the drawer or indorser of a bill knows that the acceptor is dead⁹⁷ or bankrupt,⁹⁸ notice must nevertheless be given; so, also, if the drawer or indorser be dead or bankrupt (s. 49 (9), (10)). Reasonable diligence is a question of fact.⁹⁹

(b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice.¹

⁸⁸ Comparing this sub-s. with the corresponding provisions of s. 46 (2), it will be seen that notice of dishonour is dispensed with in several cases when presentment for payment is not.

⁸⁹ *Allen v. Edmundson* (1848), 2 Exch. at p. 728; 154 E. R.; discussed *Studdy v. Beesty* (1889), 60 L. T. at p. 649, C. A.

⁹¹ *Mackay v. Judkins* (1858), 1 F. & F. 208; 175 E. R., Byles, J.; cf. s. 49 (15).

⁹² *Allen v. Edmundson* (1848), 2 Exch. at p. 728; 154 E. R.; discussed *Studdy v. Beesty* (1889), 60 L. T. at p. 649, C. A.

⁹³ *Beveridge v. Burgess* (1819), 8 Camp. 262; 170 E. R.

⁹⁴ *Thackray v. Blackett* (1811), 8 Camp. 164; 170 E. R.

⁹⁵ *Studdy v. Beesty* (1889), 60 L. T. 647, C. A.

⁹⁶ *Carew v. Duckworth* (1869), L. R. 4 Ex. at p. 319.

⁹⁷ *Gaunt v. Thompson* (1849), 18 L. J. C. P. 125; French Code, Art. 163; Pothier, No. 147.

⁹⁸ *Esdaile v. Sowerby* (1809), 11 East 114; 109 E. R.; cf. French Code, Art. 168.

⁹⁹ *Bateman v. Joseph* (1810), 2 Camp. at p. 462; 170 E. R.; cf. *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. at p. 642.

¹ New York Negotiable Instruments Law, § 180.

ILLUSTRATIONS

1. The drawer of a bill tells the holder before it is due that he has no fixed residence, and that he will call in a few days to see if the acceptor has paid the bill. This waives notice.²

2. The drawer of a bill informs the holder that it will not be paid on presentment. This (probably) waives notice.³

3. The indorser of a bill receives no notice of dishonour. Six weeks after the dishonour he meets the holder and promises to pay the bill. This is a waiver of notice.⁴

4. The drawer of a bill indorses it to C, who indorses it to D. On the day of dishonour, but before the fact of dishonour could be known, the drawer, knowing the acceptor to be insolvent, says to C, "I suppose I shall have to take up the bill. If you will call with it in a few days I will pay you." D gives no notice of dishonour either to C or the drawer. D cannot avail himself of the promise to C, and sue the drawer.⁵

5. The drawer of a bill indorses it to C, who indorses it to D. Some time after the dishonour, the drawer, who has received no notice, is informed by C that D, the holder, is going to sue him. The drawer says he will pay if D will give him time. This is evidence of waiver of notice.⁶

6. Two companies have the same secretary. A bill is drawn by one company on the other, and is indorsed to C. The bill is dishonoured by the acceptors, and no notice is given to the drawers. There is no waiver. C cannot recover on this bill, and the fact that the secretary knew that the bill was going to be dishonoured is immaterial.⁷

7. Bill dishonoured, and no notice given to indorser. The indorser makes a payment on account under the mistaken belief that she was a joint acceptor. This is not a waiver of notice.⁸

Waiver of notice of dishonour in favour of the holder enures for the benefit of parties prior to such holder as well as subsequent holders.⁹

Waiver of notice of dishonour by an indorser does not affect parties prior to such indorser.¹⁰

An acknowledgment of liability must be made with full knowledge of the facts in order to operate as a waiver of notice of dishonour.¹¹ Thus, a bill is refused payment at maturity. The indorser promises the holder to pay it, not knowing that it had been previously dishonoured by non-acceptance. This is no waiver. Again, a waiver of notice of dishonour may not include a waiver of presentment for payment.¹²

² *Phipson v. Kellner* (1815), 4 Camp. 285; 171 E. R.; cf. *Burgh v. Legge* (1839), 5 M. & W. 418; 151 E. R.

³ *Brett v. Levett* (1811), 18 East, at p. 214; 104 E. R.

⁴ *Cordery v. Colville* (1868), 32 L. J. C. P. 210.

⁵ *Pickin v. Graham* (1838), 1 Cr. & M. 725; 149 E. R.

⁶ *Woodk v. Dean* (1882), 32 L. J. Q. B. 1. See further, *Leaean v. Kirkman* (1850), 6 Jur. (N.S.) 17; *North Stafford Loan Co. v. Wythies* (1861), 2 F. & F. 563; 175 E. R.; *Kilby v. Rochussen* (1865), 18 C. B. (N.S.) 857; 144 E. R.; *Sheldon v. Horton* (1870), 43 New York R. 98.

⁷ *Re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507; *aliter*, if it was the secretary's duty to give notice.

⁸ *McFavish v. Michael's Trustees*, [1912] S. C. 425, Court of Session.

⁹ *Rabey v. Gilbert* (1861), 30 L. J. Ex. 170.

¹⁰ *Turner v. Leach* (1821), 4 B. & Ald. 451; 106 E. R.; cf. *New York Negotiable Instruments Law*, § 161, as to construction of express waivers.

¹¹ *Goodall v. Dole* (1787), 1 T. R. 712; 99 E. R.; cf. *Pickin v. Graham* (1838), 1 Cr. & M. at p. 729; 149 E. R.

¹² *Keith v. Burke* (1836), 1 C. & E. 551.

Many of the cases fail to distinguish between admissions of liability, which are evidence of due notice having been received, and admissions of liability when due notice has not been given, and which therefore are evidence of waiver. The distinction is important.¹³ In America it has been held that an oral waiver of notice may be revoked before the time for giving notice has expired.¹⁴

As to the insertion of an express stipulation in a bill waiving notice, see s. 16 (2).

As regards drawer.

(c) As regards the drawer in the following cases, namely—

- (1) where drawer and drawee are the same person,¹⁵
- (2) where the drawee is a fictitious person, or a person not having capacity to contract,¹⁶ (8) where the drawer is the person to whom the bill is presented for payment,¹⁷ (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill,¹⁸ (5) where the drawer has countermanded payment¹⁹:

ILLUSTRATIONS

1. Bill is made payable at the drawer's own house. *Prima facie* this is a bill accepted for the accommodation of the drawer. It is accepted and dishonoured. The drawer therefore (*prima facie*) is not entitled to notice.²⁰

2. A bill is signed by the drawer in order to accommodate the acceptor. The drawer is entitled to notice.²¹

¹³ As to what is evidence of due notice, see *Taylor v. Jones* (1809), 2 Camp. 105; *Hicks v. Beaufort* (1838), 4 Bing. N. C. 226; 182 E. R.; *Brownell v. Bonney* (1841), 1 Q. B. 99; *Curlewis v. Corfield* (1841), 1 Q. B. 814; *Campbell v. Webster* (1845), 15 L. J. C. P. 4; *Mills v. Gibson* (1847), 16 L. J. C. P. 249; *Jackson v. Collins* (1848), 17 L. J. Q. B. 142; *Bartholomew v. Hill* (1862), 5 L. T. 756. As to what is not, *Borradaile v. Lowe* (1811), 4 Taunt. 98; 128 E. R.; *Brathwaite v. Coleman* (1835), 4 N. & M. 654; *Bell v. Frankis* (1842), 4 M. & G. 446; 184 E. R.; *Holmes v. Staines* (1850), 8 C. & K. 19; 175 E. R.

¹⁴ *Second Nat. Bank v. Maguire* (1877), 31 Amer. R. 599.

¹⁵ See "person" defined by s. 2, and see s. 5 (3). *Qu.* as to case of two firms having a common partner, see *New York Contracting Co. v. Selma Savings Bank* (1874), 28 Amer. R. 552.

¹⁶ See *Leach v. Hewitt* (1813), 4 Taunt. 731; 128 E. R.; *Smith v. Ballamy* (1817), 2 Stark. 228; 171 E. R.; and s. 5 (2).

¹⁷ See "person" defined by s. 2, and see s. 5 (2). *Qu.* as to the case of two firms having a partner in common, see *New York Contracting Co. v. Selma Savings Bank* (1874), 28 Amer. R. 552. See further, *Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

¹⁸ See *Brokerdike v. Bollman* (1786), 2 Smith L. C. (11th ed.), p. 102, and notes; *Dickens v. Beal* (1836), 10 Peters 572, Sup. Ct. N. S.

¹⁹ Cf. *New York Negotiable Instruments Law*, § 185.

²⁰ *Sharp v. Bailey* (1829), 9 B. & C. 44; 109 E. R.; cf. *Carter v. Flower* (1847), 16 M. & W. 743.

²¹ *Sleigh v. Sleigh* (1850), 5 Exch. 514; 155 E. R.

3. A having the balance of £10 at his bankers, and having no authority to overdraw, draws a cheque for £50. A is not entitled to notice.²²

4. A bill is drawn and accepted to accommodate X, who is not a party to it, but who is to provide for it. The drawer is entitled to notice of dishonour.²³

5. A, having a small balance in B's hands, draws on him for a larger sum. B accepts, but fails to pay. A is perhaps entitled to notice.²⁴

6. A bill is drawn, accepted and indorsed by three persons in order to raise money for their joint benefit. The drawer and indorser are entitled to notice.²⁵

7. A supplies goods to B on six months' credit, and then proceeds to draw a bill on him payable two months after date. If B refuses to accept, A is not entitled to notice.²⁶

Prima facie the acceptor is, as between himself and the drawer, the person bound to pay it; but evidence is admissible to show that he is in reality a mere surety for the drawer, or some other party.²⁷

As the clause originally stood, it ran, "where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill, and the drawer has no reason to expect that it will be honoured on presentment". These latter words were struck out in committee. Therefore, the cases in which, before the Act, notice was held necessary on this ground, must be reconsidered with reference to this amendment.

As regards indorser.

- (d) As regards the indorser in the following cases, namely—(1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.²⁸

ILLUSTRATION

The indorser of a bill becomes the executor of the acceptor. It is presented to him and he dishonours it. He is not entitled to notice.²⁹

"Person" is defined by s. 2; note the distinctions between this clause and the last. The clause as drafted ran, "where the bill was accepted or made for his accommodation and he has no reason to

²² *Carew v. Duckworth* (1869), L. R. 4 Ex. 813; cf. *Wirth v. Austin* (1875), L. R. 10 C. P. 686.

²³ *Lafitte v. Slatter* (1880), 6 Bing. 692; 180 E. R.; cf. *Turner v. Samson* (1876), 2 Q. B. D. 23, C. A.

²⁴ *Thackray v. Blackett* (1811), 8 Camp. 164. *Qu.* since the Act.

²⁵ *Foster v. Parker* (1876), 2 Q. C. P. D. 18; cf. *Malkass v. Sidle* (1859), 28 L. J. C. P. 257.

²⁶ *Claridge v. Dalton* (1815), 4 M. & S. 226; 105 E. R.

²⁷ *Cook v. Lister* (1868), 32 L. J. C. P. at p. 127.

²⁸ New York Negotiable Instruments Law, § 186.

²⁹ *Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

expect that it will be honoured on presentment". The latter words were struck out in committee.

When a bill is dishonoured which is void for want of being duly stamped, notice of dishonour need not be given, for the holder's only remedy is in an action on the consideration, and not on the instrument itself.³⁰

Notice to charge Acceptor, Maker, or Stranger

Notice to acceptor unnecessary.—By s. 52 (8), the acceptor of a bill of exchange or maker of a note, is not in any case entitled to notice of dishonour.³¹

Guarantor.—A person who has given a guarantee for the payment of a bill by the acceptor is not entitled to notice of dishonour. Thus:—

1. The indorser of a bill gives a bond to secure its payment. Want of notice of dishonour is no defence to an action on the bond.³²

2. X gives a guarantee for the price of goods to be supplied to the acceptor of a bill. X is not entitled to notice of dishonour.³³

8. X gives a guarantee for the price of goods to be supplied to the drawer of a bill. X is entitled to notice of dishonour,³⁴ since he did not guarantee the payment of the bill.

4. X guarantees the payment of a note "if it be not duly honoured and paid" by the maker. X is not entitled to notice of dishonour.³⁵

5. A debtor gave his creditor a bill accepted by himself, but with the drawer's name in blank. X as surety for the debt deposited certain stock certificates with the creditor as collateral security. The acceptor died insolvent, without the creditor having inserted any drawer's name. The bill was never presented for payment, and no notice was given to X. *Held*, that X was not discharged.³⁶ Although interested in the bill he was not a party to it.

In America the cases conflict. The balance of authority inclines to the view that notice of dishonour need not be given to a guarantor.³⁷

It is prudent to give a guarantor some notice.

Person liable on consideration.—A person who is not a party to a bill, but who is liable on the consideration for which it is given, is

³⁰ *Cundy v. Marriott* (1821), 1 B. & Ad. 696; 109 E. R.

³¹ *Cf. Rowe v. Tipper* (1858), 22 L. J. C. P. at p. 137; *Pearse v. Pemberthy* (1812), 8 Camp. 261; 170 E. R. (maker of promissory note).

³² *Murray v. King* (1821), 5 B. & Ald. 165; 106 E. R.

³³ *Holbrow v. Wilkins* (1822), 1 B. & C. 10; 107 E. R.

³⁴ *Philips v. Astling* (1800), 2 Taunt. 206; 127 E. R.; *cf. Hitchcock v. Humphrey* (1848), 5 M. & Gr. at p. 564; 134 E. R.

³⁵ *Walton v. Mascal* (1844), 13 M. & W. 72; 153 E. R.; see *ibid.* at p. 452.

³⁶ *Carter v. White* (1883), 25 Ch. D. 666, C. A.

³⁷ See, *e.g.*, *Brown v. Curtis* (1849), 2 New York R. 225; *contra*, *Foot v. Brown* (1841), 2 McClean 869.

(probably) entitled to notice of dishonour, if he is prejudiced by not getting notice. Thus:—

1. X buys goods from D to be paid for “by approved banker’s bill”. C, who is X’s broker, obtains a banker’s bill payable to his own order and indorses it to D. If the bill be dishonoured because it has not been promptly presented for acceptance, and the drawer has in the meantime failed, X (probably) is not liable for the price of the goods unless he receives notice of dishonour.³⁸

2. C, the holder of a country bank note, transfers it to D, without indorsing it, in conditional payment for goods supplied by D. If the bank fails C is not liable for the price of the goods unless he received notice of dishonour.³⁹

The two last cited cases justify the proposition that the same strict and technical notice of dishonour is not requisite to charge a person liable on the consideration as is requisite to charge a party liable on the bill. This is fair, for in the one case the liability is transferable, in the other it is not, and therefore all defences between the parties can be inquired into. A distinction might be drawn between persons liable on the consideration who have, and who have not, been holders of the bill.⁴⁰

Noting inland bill.

51. (1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.⁴¹

“Noting” means the minute made by a notary public on the bill at the time of its dishonour. The formal notarial certificate, or protest, attesting the dishonour of the bill is based upon the noting. See s. 98.

“Noting” consists of the notary’s initials, the date, the noting charges, and a mark referring to the notary’s register all written on the bill itself. The notarial registers bear certain letters upon them, and a corresponding letter is put upon the bill as a mark. A ticket or label is also attached to the bill on which is written the answer

³⁸ *Smith v. Mercer* (1867), L. R. 8 Ex. 51; *contra*, *Swinyard v. Bowers* (1816), 5 M. & S. 62; 105 E. R. (not cited).

³⁹ *Camidge v. Allenby* (1827), 6 B. & C. 878; 108 E. R.; *Turner v. Stones* (1848), 1 D. & L. 122; *Robson v. Oliver* (1847), 10 Q. B. 704; 116 E. R. (cases on country bank notes); cf. s. 58. When a man takes a country bank note as payment for a debt, it may perhaps be inferred on very slight evidence that he has taken it as absolute, and not as conditional, payment.

⁴⁰ Cf. *Camidge v. Allenby* (1827), 6 B. & C. at p. 881; 108 E. R.

⁴¹ Cf. New York Negotiable Instruments Law, § 180.

given to the notary's clerk who makes the notarial presentment, *e.g.*, "no orders", "no advice", "no effects", or "office closed". Before sending out the bill the notary makes a full copy of it in his register, subsequently adding the answer (if any) given.⁴²

By s. 78 this provision applies to cheques, and by s. 89 to promissory notes. By s. 57 the expenses of noting can be recovered as liquidated damages.

This Act attaches no legal consequences to noting an inland bill,⁴³ except by making it a necessary preliminary to acceptance or payment for honour: see ss. 65 and 67. For business purposes noting is usually taken as showing due presentment. For purposes of summary diligence in Scotland an inland bill must be protested as heretofore: s. 98.

Protest of foreign bill.

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged.⁴⁴ Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.⁴⁵

"Foreign bill" is defined by s. 4. Protest of a foreign note is unnecessary for English purposes (s. 89 (4)). As to protest for purposes of summary diligence in Scotland, see note to s. 98. By s. 52 (8) protest is not necessary in order to charge the acceptor of a bill.

The notice of dishonour is not bad because it omits to state that the bill has been protested,⁴⁶ though it should state it. As to notice of protest under the foreign codes, see note to s. 40 (12).

The protest of a bill in England does not prove due presentment,⁴⁷

⁴² Brooke's Notary, 8th ed., p. 86. The fee charged by London notaries outside the City varies according to distance (*ibid.* p. 407); and evidence before Select Committee on Bank Holidays Bill, 1868, see at pp. 51—53.

⁴³ Cf. *Cheeser v. Noyes* (1815), 4 Camp. 129; 171 E. R. (noting or protest of bill in England no evidence of due presentment); cf. *Nye v. Macdonald* (1870), L. R. 8 F. C. 581, at p. 545 (notarial certificate of execution of deed).

⁴⁴ *Gale v. Walsh* (1798), 5 T. R. 289; 101 E. R.; cf. *Whitehead v. Walker* (1842), 9 M. & W. 506; 152 E. R.

⁴⁵ Cf. New York Negotiable Instruments Law, § 260.

⁴⁶ *Es p. Lowenthal* (1874), L. R. 9 Ch. 591; and see p. 151.

⁴⁷ *Cheeser v. Noyes* (1815), 4 Camp. 129; 171 E. R.

aliter, it seems, when the bill is protested abroad, for there it is a judicial act.⁴⁸

For non-payment after non-acceptance.

(8) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.⁴⁹

Protest in such case might be necessary for the purpose of charging a foreign drawer or indorser in his own country. A British Act can only lay down the law for the United Kingdom, though by the comity of nations the duties of the holder would generally be regarded as regulated by the law of the place where they are to be performed. It has already been pointed out (p. 189) that, under most of the continental codes, no right of action arises on non-acceptance; the holder can demand security from antecedent parties, but he is bound to re-present the bill at maturity.

Time of protest.

(4) Subject to the provisions of this Act,⁵⁰ when a bill is noted or protested [it may be noted on the day of its dishonour, and must be noted not later than the next succeeding business day]. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.⁵¹

The provisions referred to are sub-s. (6) (a) and sub-s. (9). The provisions of this sub-section as to the extension of the protest are supplemented by s. 98.

By s. 1 of the Bills of Exchange (Time of Noting) Act, 1917 (7 & 8 Geo. 5, c. 48), p. 868, the words in square brackets were substituted for the words "it must be noted on the day of its dishonour". The Act was passed to relieve notaries who were in difficulties owing to the depletion of their staffs during the war; but the change was advocated before the war by the British delegates to The Hague Conferences on Negotiable Instruments. By French Code, Art. 162, a bill is to be protested for non-payment on the day after it is due. By German Exchange Law, Art. 41, a dishonoured bill may be protested for non-payment on the day it is due, and it must not be protested later than the second day thereafter. The laws of different nations on the point are collected in Nonguiet, § 1270.

⁴⁸ *Brain v. Preese* (1843), 11 M. & W. at p. 775; 152 E. R.; cf. *Pool v. Dias* (1885), 1 Bing. N. C. 649; 130 E. R.; Daniel, 5th ed., § 968.

⁴⁹ New York Negotiable Instruments Law, § 265.

⁵⁰ See sub-s. (9) of this section.

⁵¹ New York Negotiable Instruments Law, § 263.

Protest for better security.

(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.⁵²

Under some of the continental codes, when the acceptor fails during the currency of a bill, security can be demanded from the drawer and indorsers.⁵³ English law provides no such remedy, and the only effect of such a protest in England is that the bill may be accepted for honour. In France, if the acceptor fails, the bill may at once be treated as dishonoured and protested for non-payment.⁵⁴ As to inhibition and arrestment in Scotland when the acceptor is *vergens ad inopiam*, see *Hamilton's Bills of Exchange Act*, p. 112.

Place of protest.

(6) A bill must be protested at the place where it is dishonoured: ⁵⁵

Provided that—

- (a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day.

For a note on the meaning of "place", see p. 158.

This subsection was inserted in committee to protect a common practice of the Liverpool notaries with regard to bills drawn on cotton spinners in Lancashire.

- (b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no

⁵² See Brooke's Notary, 8th ed., p. 98, and forms, p. 171; cf. New York Negotiable Instruments Law, § 266.

⁵³ See, e.g., German Exchange Law, Art. 29; Netherlands Code, Arts. 177, 178.

⁵⁴ French Code, Art. 168; Nougier, § 1277.

⁵⁵ Cf. *Mitchell v. Baring* (1929), 10 B. & C. 4; 109 E. R.; French Code, Art. 178, and see s. 94 as to protest in places where there is no notary available. Cf. New York Negotiable Instruments Law, § 264, which, however, omits proviso (a).

further presentment for payment to, or demand on, the drawee is necessary.

This sub-section reproduces the effect of the repealed 2 & 3 Will. 4, c. 98. Suppose a bill is drawn on B in Liverpool, "payable at the X Bank in London". It is dishonoured by non-acceptance. It is to be protested for non-payment in London without any further demand on B. Ordinarily the protest recites the demand on the acceptor or other person called on to pay.

Requisites in form of protest.

(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

- (a) The person at whose request the bill is protested :
- (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.⁵⁶

A protest ordinarily contains : (1) An exact copy of the bill. (2) A statement of the parties for whom and against whom the bill is protested. (3) The date of protesting and the place where protest is made. (4) A statement that acceptance or payment was demanded by the notary; the terms of the answer, if any; or a statement that no answer was given, or that the drawee or acceptor could not be found. (5) A reservation of rights against the parties liable. (6) The subscription and seal of the notary making the protest.⁵⁷ The protest must be stamped (see p. 854). A protest may be in duplicate or triplicate.⁵⁸ Words requiring a protest to be under seal were struck out in committee.

Notaries.—The protest must ordinarily be made by a notary public or other person authorised to act as such,⁵⁹ but, by s. 94, when the services of a notary cannot be obtained at the place where the bill is dishonoured, protest may be made by any respectable inhabitant in the presence of two witnesses. By the Public Notaries Act, 1888 (8 & 4 Will. 4, c. 70), solicitors in the country may be authorised by the Master of Faculties to practise as notaries. As to the exercise of

⁵⁶ Cf. New York Negotiable Instruments Law, § 261.

⁵⁷ See Brooke's Notary, 8th ed., p. 88, n.; and for forms, see pp. 165—189; cf. French Code, Art. 178; German Exchange Law, Art. 88.

⁵⁸ Brooke's Notary, 8th ed., p. 88, n.; *Geratopulo v. Wieler* (1851), 20 L. J. C. P. 105.

⁵⁹ Cf. German Exchange Law, Art. 87; French Code, Art. 178. As to the status and functions of a notary, see Brooke's Office of a Notary, 8th ed.; for forms, see *ibid.* pp. 269 *et seq.*, and for fees in London, 6th ed., p. 401; and see Laws of England, tit. Notaries.

notarial functions by British diplomatic and consular officers abroad, see 52 & 53 Vict. c. 10, s. 6, as amended by 54 & 55 Vict. c. 50. In England the notarial presentment of the bill to the drawee or acceptor is almost always made by the notary's clerk.⁶⁰ In America the validity of a protest founded on such a presentment has been doubted.⁶¹ As to notaries in Wales, see s. 37 of the Welsh Church Act, 1914 (4 & 5 Geo. 5, c. 91).

Protest of lost bill or for non-delivery.

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.⁶²

Excuses for non-protest or delay.

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence.⁶³ When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.⁶⁴

See s. 50 as to excuses for non-notice and delay. Compare s. 46 as to excuses for non-presentment and delay. See also s. 16 (2) as to indorsements waiving protest. Presumably this sub-section incorporates also s. 48 (1), which excuses non-notice in the case of a bill dishonoured by non-acceptance which subsequently comes into the hands of a holder in due course.

Duties of holder as regards drawee or acceptor.

52. (1) When a bill is accepted generally⁶⁵ presentment for payment is not necessary in order to render the acceptor liable.⁶⁶

⁶⁰ Brooke's Notary, 8th ed., p. 86; and Thomson, p. 810, as to Scotland.

⁶¹ See Parsons on Bills, p. 641; and cf. New York Negotiable Instruments Law, § 269, and notes in Crawford's edition.

⁶² Pothier, No. 145; Brooke's Notary, 8th ed., p. 89. See further as to lost bills, ss. 68 and 70. The particulars can usually be obtained from the bill book. Cf. New York Negotiable Instruments Law, § 268.

⁶³ *Legge v. Thorpe* (1810), 19 East 171; 104 E. R.; see, e.g., *Campbell v. Webster* (1845), 15 L. J. C. P. 4 (waiver); *Rothschild v. Currie* (1841), 1 Q. B. at p. 47 (delay).

⁶⁴ New York Negotiable Instruments Law, § 267.

⁶⁵ S. 19 distinguishes general and qualified acceptances.

⁶⁶ *Bank Polski v. Mulder & Co.*, [1941] 2 A. E. R. 647 (Tucker, J.); [1942] 1 A. E. R. 896, C. A.; *Rowe v. Young* (1820), 2 Bligh H. L. at pp. 467, 468;

The justification for this subsection is that at common law the debtor, as a general rule, must seek out his creditor to pay him.⁶⁷ The practical importance of the rule is that the acceptor cannot avail himself of any informality in the presentment. The holder would not be likely to bring an action without first applying for payment. If he did so, the Court presumably would make him pay the costs, and deprive him of interest.⁶⁸ Serjeant Manning, in a note to a case he reports,⁶⁹ suggests that if the holder (*i.e.*, the creditor) were out of England during the whole of the day on which the bill matured, it might be necessary to prove a demand before the acceptor could be sued.

By s. 89 this enactment applies *mutatis mutandis* to the maker of a note.

Qualified acceptance.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.⁷⁰

The acceptor may, by the terms of a qualified acceptance, make presentment for payment a condition precedent to his liability.⁷¹ Thus, if a bill be accepted "Payable at the Union Bank only", the holder must present it for payment at that bank before he can sue the acceptor.⁷² When a bill is accepted payable at a particular place and there only, the acceptor's position is for many purposes analogous to that of the drawer of a cheque.⁷³ If, then, he could

4 A. E. R., *per* Bayley, J.; cf. *Maltby v. Murrells* (1880), 5 H. & N. at p. 828; 157 F. R. See also the old form of declaration against an acceptor or maker in Bullen and Leake's *Precedents of Pleading*, 3rd ed.

⁶⁷ *Cranley v. Hillary* (1813), 2 M. & S. 120; 105 E. R.; *Walton v. Mascall* (1844), 13 M. & W. at p. 458; 153 E. R. (promissory note); cf. *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. 31, at p. 37, distinguishing in this respect collateral from direct promises to pay.

⁶⁸ Cf. *Macintosh v. Haydon* (1826), Ry. & M. at p. 863; 171 E. R., as to costs; *Pierce v. Fothergill* (1895), 2 Bing. N. C. 167; 180 E. R., as to interest; and cf. s. 57 (8); and see *Webster v. British Empire Assurance Co.* (1880), 15 Ch. D. 169, *per* Cotton, L.J.

⁶⁹ *Wilnot v. Williams* (1844), 7 M. & Gr. at p. 1018; 185 E. R.; cf. *Startup v. Macdonald* (1848), 6 M. & Gr. at p. 624; 184 E. R.

⁷⁰ *Smith v. Vertue* (1860), 30 L. J. C. P. at p. 59 (conditional acceptance); see *per* Keating, J., at p. 60, as to acceptance to pay at a particular place; and see p. 46. Cf. New York Negotiable Instruments Law, § 180.

⁷¹ S. 19; and *Rowe v. Young* (1820), 2 Bligh H. L. 391; 4 E. R.

⁷² *Halstead v. Skelton* (1843), 5 Q. B. at pp. 93, 94; 114 E. R. Ex. Ch.

⁷³ *Bishop v. Chitty* (1742), 2 Stra. 1195; 98 E. R.; *Ramohurn Mullick v. Luchmehchand Radokissen* (1854), 9 Moore P. C. at p. 70; 14 E. R., *per* Parke, B.

show that he was damnified by the holder's omission to present on the proper day, he would probably be discharged.⁷⁴ Apart from such damnification he is liable until the Statute of Limitations applies.⁷⁵

By s. 87 (1), when a note is in the body of it made payable at a particular place, presentment is required to charge the maker; and, by s. 89 (2), the provisions of this subsection would apply to that case.

No notice or protest required.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

Thus, if B in Liverpool accepts a bill payable at a bank in London, and it is presented there and dishonoured, no notice of dishonour need be given to B.⁷⁶ The same rule applies to the maker of a note.⁷⁷

Production of bill.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.⁷⁸

"Holder" is defined by s. 2; for "payment", see further s. 59. "The person who demands payment of a bill", says Platt, B., "must produce the bill, and offer to deliver it up on payment."⁷⁹ "The acceptor paying the bill", says Lord Tenterden, "has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer."⁸⁰ When a bill has been accepted payable at a bank, the practice is for the banker to return it to the acceptor the day after payment.

⁷⁴ Cf. *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; 135 E. R. (case of a cheque where bank failed); and New York Negotiable Instruments Law, § 130, and notes in Crawford's edition; *aliter*, if the acceptance be general, *Turner v. Hayden* (1825), 4 B. & C. 1; 107 E. R.

⁷⁵ *Smith v. Vertue* (1860), 80 L. J. C. P. 56.

⁷⁶ *Treacher v. Hinton* (1821), 4 B. & Ald. 413; 106 E. R.; cf. *Rowe v. Tipper* (1853), 22 L. J. C. P. at p. 187.

⁷⁷ S. 89 (2), and *Pearse v. Pemberthy* (1812), 3 Camp. 261; 170 E. R.

⁷⁸ New York Negotiable Instruments Law, § 134, to same effect.

⁷⁹ *Ramus v. Crowe* (1847), 1 Exch. 167, at p. 174; 154 E. R.

⁸⁰ *Hansard v. Robinson* (1827), 7 B. & C. 90, at p. 94; 108 E. R.; *Crowe v. Clay* (1854), 9 Exch. 604; 156 E. R., Ex. Ch.; German Exchange Law, Art. 89; cf. *Jones v. Broadhurst* (1850), 9 C. B. at p. 182; 137 E. R.; and *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. at p. 18, H. L., as to payment by drawer or indorser; and *Gornes v. Taylor* (1854), 10 Exch. 441; 156 E. R.; *Woodward v. Pell* (1868), L. R. 4 Q. B. 55 (lien for costs).

At common law an exception to the rule in this subsection was recognised in the case of a non-negotiable note.⁸¹

For the case of a lost bill or note, see note to s. 70. Surrendering the bill is a concurrent condition, and not a condition precedent to payment. The continental codes for the most part provide that the holder must take part-payment if it is offered. In that case he may retain the bill, but must indorse upon it the amount he has received. As to production for proof or dividend in bankruptcy, see p. 362.

The holder by producing the bill and demanding acceptance or payment does not warrant the authenticity of the instrument, or of the bill of lading, if any, attached thereto.⁸²

⁸¹ *Wain v. Bailey* (1839), 10 A. & E. 616; 113 E. R.; *Charnley v. Grundy* (1854), 14 C. B. at p. 614; 139 E. R.

⁸² *Guaranty Trust Co. of New York v. Hannay* (1918), 28 Com. Cas. 399, 402, C. A.; [1918] 2 K. B. 623, 631, C. A. Cf. p. 141.

Liabilities of Parties

Funds in hands of drawee.

53. (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.⁸⁵ This subsection shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.⁸⁶

ILLUSTRATIONS

1. A, having £100 at his bankers, draws a cheque on them for that sum in favour of C. The cheque is dishonoured. C has no remedy against the bankers.⁸⁵

2. B gives A an open letter of credit authorising him to draw to the extent of £10,000, and concluding "parties negotiating bills under it are requested to indorse particulars on the back hereof". A accordingly draws a bill for £500 in favour of C, who duly indorses the particulars on the credit. B becomes insolvent, and dishonours the bill on presentment. C can prove for £500 against B's estate. There is privity of contract between B and C under the letter of credit which constituted an offer to any nominee of A who accepted it by indorsing particulars on the letter.⁸⁶

3. A draws a bill on B in favour of C, and remits funds to meet it. B does not accept the bill, but he tells C that he has received the funds and promises to pay the bill. B does not pay the bill. No action on the bill can be maintained against B, but C can sue B for money received to his use.⁸⁷

4. A German bank, before war, draws a cheque on an English bank in favour of an English payee, and in consequence of war breaking out the cheque is refused payment. The payee cannot attach the funds of the German bank in the hands of the English bank.⁸⁸

Not an assignment of funds in England.—According to English law, the drawee of a bill, as such, incurs no liability to the

⁸⁵ New York Negotiable Instruments Law, § 211, and notes in Crawford's edition.

⁸⁶ Thomson on Bills, 2nd ed., p. 104; Thorburn's Bills of Exchange Act, p. 126; Bell's Principles, 9th ed., §§ 815 and 830.

⁸⁷ *Schroeder v. Central Bank* (1876), 34 L. T. (N.S.) 795. Cf. *Re Swinburne*, [1926] cited p. 248.

⁸⁸ *Re Agra Bank* (1867), L. R. 2 Ch. 391; cf. *Re p. Stephens* (1868), L. R. 3 Ch. at p. 766; *Union Bank of Canada v. Cole* (1877), 47 L. J. C. P. 100. C. A.; and *Citizens Bank v. New Orleans Bank* (1878), L. R. 6 H. L. 352; see, too, *Sassoon & Sons v. International Banking Corporation*, [1927] A. C. 711, which distinguishes *Re Agra Bank*, *supra*.

⁸⁷ *Griffin v. Weatherby* (1868), L. R. 3 Q. B. 759.

⁸⁸ *Re Bank für Handel Industrie*, [1915] 1 Ch. 848.

holder, and there is no privity of contract between them⁸⁹; but privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement.⁹⁰ In one instance, too, a *quasi*-privity has been created by s. 74 (8), which provides that when the holder of a cheque omits to present it within a reasonable time, whereby the drawer has been damnified (*i.e.*, by the bank failing), the drawer is *pro tanto* discharged, and the holder is substituted as a creditor of the bank.

In England, again, when a bill is accepted payable at a banker's, there is no privity between the drawer or holder and the acceptor's banker.⁹¹

In Scotland the rule is otherwise: thus, where A having £100 at his bankers drew a cheque for £150, it was held that the cheque on presentation operated as an intimated assignation of the £100 to his credit⁹²; so, too, where a bill is accepted payable at a banker's, it operates on presentment as an intimated assignation.⁹³

In France, as in Scotland, when the drawee has funds, drawing a bill operates as an assignment of them in favour of the holder, and creates a privity between holder and drawee.⁹⁴

Letters of Credit.—A letter of credit, says Story, is “a letter of request whereby one person (usually a merchant or banker) requests some other person to advance moneys or give credit to a third person named therein for a certain amount, and promises that he will repay such sum to the person advancing the same or accept bills drawn upon himself for the like amount. It is called a general (or open) letter of credit when it is addressed to all merchants or other persons in general; and it is called a special letter of credit when it is addressed to a particular person by name requesting him to make such advance to a third person”.⁹⁵

The nature of a letter of credit was commented on by Lord Cairns in a case where it was held that a writing opening a credit for a particular sum does not of itself constitute an equitable assignment

⁸⁹ *Hopkinson v. Forster* (1874), L. R. 10 Eq. 74 (cheque); *Shand v. Du Buisson* (1874), L. R. 10 Eq. 288 (bill of exchange); *Carr v. Nat. Bank* (1871), 107 Massachusetts R. 45; Netherlands Code, Art. 110; cf. *Vaughan v. Halliday* (1874), L. R. 9 Ch. 561.

⁹⁰ *Robey v. Oliver* (1872), L. R. 7 Ch. 695; *Ranken v. Alfaro* (1877), 5 Ch. D. 786.

⁹¹ *Hill v. Royds* (1869), L. R. 8 Eq. 290; *Yates v. Bell* (1820), 3 B. & Ald. 648; *Moore v. Bushell* (1857), 27 L. J. Ex. 4; *Auchteroni & Co. v. Midland Bank, Ltd.* (1928), 97 L. J. K. B. 625. By § 147 of the New York Negotiable Instruments Law, “When the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon”.

⁹² *British Linen Co. v. Carruthers* (1868), 10 Rottie 923.

⁹³ *British Linen Co. v. Rainey* (1865), 12 Rottie 825.

⁹⁴ *Bravard-Demangeat*, 7th ed., p. 235; Nougier, §§ 392—431.

⁹⁵ Story, §§ 459 *et seq.* See the American cases on credits analysed in *British Linen Co. v. Coladenian Insurance Co.* (1861), 4 Macq. H. L. 107, at p. 112, n.

or specific appropriation of that sum so as to create a trust. It is an undertaking that the person giving it will act as paymaster to the person to whom it is given, up to a certain amount, on his performing the conditions set forth in it. It is usually operated on by bills of exchange, but it may be operated on by cheques or simple demand of payment.⁹⁶ Illustration 2 is an example of an open letter of credit. An open letter of credit has been distinguished from an ordinary or special credit by Brett, L.J.⁹⁷ By s. 82 of the Stamp Act, 1891, p. 348, a credit to be used in the United Kingdom requires a stamp.

A letter of credit is not a negotiable instrument, and the production of it does not authorise payment of drafts under it to the person presenting it if, as a fact, those drafts are forged.⁹⁸ So, too, where a letter of credit in favour of C was stolen, and the thief, having indorsed C's name on it, represented that he was authorised by C to receive the amount, it was held that payment to him did not discharge the paying bank.⁹⁹

London has always been the great accepting centre of the world, and much foreign trade, some of which never comes near England, has been financed by bills on London. These bills and others are drawn under various forms of credit framed to meet the exigencies of commerce. Besides the familiar traveller's credits, there are confirmed and unconfirmed credits,¹ clean credits and documentary credits, rolling credits, and the London acceptance credit.² An unconfirmed credit may be described as a mere authority to draw bills in accordance with the terms of the credit, while a confirmed credit contains a binding promise to honour bills so drawn.³

Drawee and Drawer.—Subject to the rule that a customer is entitled to draw cheques on his banker (p. 252), a creditor, as such, is not entitled to draw on his debtor in respect of his debt; and the drawee of an unaccepted bill of exchange is under no obligation to accept or pay it unless he has for valuable consideration expressly or impliedly agreed to do so.⁴

⁹⁶ *Morgan v. Larivière* (1875), L. R. 7 H. L. at p. 492. And see note to *British Linen Co. v. Caledonian Insurance Co.* (1861), 4 Macq. H. L. at p. 109.

⁹⁷ *Union Bank of Canada v. Cole* (1877), 47 L. J. O. P. at p. 109.

⁹⁸ *Orr v. Union Bank* (1854), 4 Macq. H. L. 513, see at p. 523.

⁹⁹ *British Linen Co. v. Caledonian Insurance Co.* (1861), 4 Macq. H. L. 107.

¹ As to an unconfirmed credit, see *Société Coloniale v. London & Brazilian Bank* (1911), 17 Com. Cas. 1, C. A.; *Panoutsos v. Raymond Hadley*, [1917] 2 K. B. 473, C. A. (unconfirmed credit when confirmed credit promised); *Jordeson & Co. v. London Hardwood Co.* (1918), 19 Com. Cas. 161, 178.

² See Spalding's Foreign Exchange and Foreign Bills, Chap. XV.

³ For a discussion of the rights arising under confirmed credits, see *Re Agra and Masterman's Bank* (1867), L. R. 3 Ch. 391; *Sassoon & Sons v. International Banking Corporation*, [1927] A. C. 711.

⁴ *Chitty*, p. 200; cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 351, Ex. Ch.; *Re Boyse* (1886), 38 Ch. D. 809, at p. 824; see, e.g., *Smith v. Brown* (1815), 6 Taunt. at p. 344; 128 E. R.; *Loing v. Barclay* (1823), 1 B. & C. 308; 107 E. R.; *Huntley v. Sanderson* (1888), 1 Cr. & M. 487; 149 E. R. (agent authorized to

In some continental countries the duty to accept or pay bills arises from the mere relationship of debtor and creditor in a mercantile transaction⁵; whereas here there must be an agreement founded on consideration. Apart from something special in the contract, it seems that the authority or obligation to accept is not revoked by the death of the drawer,⁶ while it is by notice of his bankruptcy; for this renders funds in the hands of the drawee no longer available for the payment of the bill, and incapacitates the drawer from fulfilling his part of the contract.⁷ The bankruptcy of the drawee is not *per se* a breach of contract with the drawer.⁸ In France the engagement between drawer and drawee is held to be a contract of "mandat", and their relations are regulated accordingly.⁹

Letter of Advice.—It is usual, but not necessary, for the drawer to advise the drawee of drafts drawn on him by letter of advice.¹⁰ If a bill is drawn "as per advice", then the drawee is not bound to accept or pay without such advice, and if he does it is at his own peril. (See *Story* on Bills, § 68.)

Damages.—When the drawee breaks his contract with the drawer by dishonouring his draft, the consequences reasonably resulting from the breach of contract constitute the measure of damage.¹¹ Thus:—

1. A customer having a balance of £200 at his banker's draws a cheque for £100, or accepts a bill for £100 payable at his banker's. If this cheque or bill is dishonoured he may recover substantial damages for the injury to his credit, without proving any actual loss,¹² but only if he is a trader; if he is not a trader he can only get nominal damages for the breach of contract unless he prove actual special damage.¹³

draw on principal; contract of indemnity); *Cumming v. Shand* (1860), 29 L. J. Ex. at p. 132 (implied agreement to let customer overdraw); *English Credit Co. v. Arduin* (1871), L. R. 5 H. L. 64 (construction of credit); *Urquhart, Lindsay & Co. v. Eastern Bank, Ltd.*, [1922] 1 K. B. 818 (liability of bank on confirmed credit, when customer countermands payment).

⁵ Pothier, No. 92; Nonguier, § 442; Belgian Code de Commerce, Art. 8.

⁶ Chitty, p. 202; Story, § 250; *Cutts v. Perkins* (1815), 12 Massachus. R. 206; cf. *Billing v. Denauw* (1841), 3 M. & Gr. at p. 574; 133 E. R.; *Att.-Gen. v. Pratt* (1874), L. R. 9 Ex. 140.

⁷ Pothier, No. 96; cf. *Citizens Bank v. New Orleans Bank* (1873), L. R. 6 H. L. 362.

⁸ *Ex p. Tondeur* (1887), L. R. 5 Eq. 160; cf. *Ex p. Agra Bank* (1870), L. R. 9 Eq. at p. 733.

⁹ Pothier, Nos. 91—100; Bravard-Demangeat, 7th ed., p. 219; Code Civil, Arts. 1984—2010.

¹⁰ *Arnold v. Cheque Bank* (1876), 1 C. P. D. at p. 586; Nonguier, §§ 281—284; Pothier, No. 86.

¹¹ *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92; cf. *Isle v. Jones* (1855), 78 Massachus. R. 280 (accommodation bill).

¹² *Robin v. Steward* (1854), 23 L. J. C. P. 148; cf. *Cumming v. Shand* (1860), 59 L. J. Ex. 129; *Summers v. City Bank* (1874), L. R. 9 C. P. 580; *Boyd v. Fitt* (1868), 14 Ir. C. L. R. 43. *Allder*, when cheque is drawn payable to self; *Kinlan v. Ulster Bank*, [1928] Ir. R. 171.

¹³ *Gibbons v. Westminster Bank*, [1939] 2 K. B. 882. Cf. *Davidson v. Barolays Bank*, [1940] 1 A. E. R. 818. See p. 252.

2. A, in a foreign country, draws on B, in England, under a letter of credit. B dishonours his draft. A may recover the re-exchange and notarial expenses which he has had to pay to the holder,¹⁴ and also the cost of telegrams, etc., consequent on the dishonour.¹⁵

Although possibly an acceptor, as such, may not be liable for re-exchange, it is clear that the drawee by accepting cannot alter or escape from his special contract with the drawer; and this might perhaps be alleged as the ground of his liability for re-exchange, etc., when sued by the drawer,¹⁶ but the probability is that the cases in which it was held that an acceptor was not liable for re-exchange are simply overruled.¹⁷ As to paying a draft contrary to instructions, see *Twibell v. London Suburban Bank*.¹⁸

Liability of acceptor.

54. The acceptor of a bill, by accepting it—

- (1) Engages that he will pay it according to the tenor of his acceptance.¹⁹

See s. 19 for general and qualified acceptances, and s. 52 for presentment to charge acceptor. As to variation of the acceptor's liability by *ex post facto* legislation, e.g., a French "*loi moratoire*", see note to s. 72 (5) (conflict of laws). As to measure of damages, see s. 57. The drawee of a bill, by accepting it, becomes the party primarily liable thereon to the holder.²⁰ See the primary, and, in general, absolute, liability of an acceptor distinguished from the secondary and conditional liability of a drawer or indorser by Bayley, J.²¹ As to the relations *inter se* of joint acceptors who are not partners, see *per* Wilde, C. J.²²

In the case of a bill accepted for value the acceptor is frequently described as the principal debtor, and the drawer and indorsers as his sureties²³; but this is not an accurate expression. The

¹⁴ *Walker v. Hamilton* (1860), 1 Da G. F. & J. 602; 45 E. R.; *Re General South American Co.* (1877), 7 Ch. D. 687.

¹⁵ *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92; *Larios v. Bonany* (1878), L. R. 5 P. C. 346, 357.

¹⁶ Cf. s. 57 (2).

¹⁷ Cf. *Ex p. Roberts* (1886), 18 Q. B. D. 286, C. A.

¹⁸ *Twibell v. London Suburban Bank*, [1869] W. N. p. 127; Paget on Banking, 2nd ed., p. 112; *London & S. W. Bank v. Bussard* (1919), 85 T. L. R. 142. But as to a confirmed irrevocable credit, see *Urquhart, Lindsay & Co. v. Eastern Bank, Ltd.*, [1922] 1 K. B. 818.

¹⁹ *Smith v. Virtue* (1860), 80 L. J. C. P. 56, at p. 60; cf. *Walton v. Mascoll* (1844), 18 M. & W. at p. 458; 169 E. R.; French Code, Art. 121; German Exchange Law, Art. 28; New York Negotiable Instruments Law, § 112.

²⁰ *Philpot v. Briant* (1828), 4 Bing. at p. 720; 130 E. R.

²¹ *Rowe v. Young* (1820), 2 Bligh, H. L. at p. 467; 4 E. R.; *Jones v. Broadhurst* (1850), 9 C. B. at p. 181; 187 E. R., *per* Cresswell, J.

²² *Harmer v. Steele* (1849), 4 Exch. at p. 18; 154 E. R.

²³ See, e.g., *Cook v. Lister* (1868), 32 L. J. C. P. at p. 127, *per* Willes, J.; *Rouquette v. Overmann* (1876), L. R. 10 Q. B. at p. 686, *per* Cockburn, C.J.

drawer or indorser "is not exactly a surety for the acceptor, or co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety" to entitle him to the equities of a surety when the bill has been dishonoured, though not before.²⁴

Tender post dlem.—A plea, by the acceptor, of tender after maturity is bad.²⁵

Estoppels binding acceptor.

(2) Is precluded from denying to a holder in due course :

- (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill²⁶ ;
- (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse,²⁷ but not the genuineness,²⁸ or validity²⁹ of his indorsement ;
- (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse,³⁰ but not the genuineness or validity of his indorsement.

This section deals only with estoppels arising on the bill. There may, of course, be other estoppels arising on evidence : see s. 24, and notes thereto. If the amount of the bill be altered, or if any

²⁴ *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas 1 H. L. at p. 19, per Lord Blackburn

²⁵ *Pool v. Tunbridge* (1837), 2 M. & W. 228; 150 E. R.; *Dobie v. Larkan* (1855), 10 Exch. 776; 156 E. R.; cf. Leake on Contracts, 8th ed., p 665. But presumably it would constitute a plea in mitigation of damage and would be relevant on a question of costs.

²⁶ *Cooper v. Meyer* (1830), 10 B. & C. 468; 109 E. R.; *Sanderson v. Collman* (1842), 4 M. & Gr. 209; 184 E. R.; *National Park Bank v. Ninth Bank* (1871), 46 New York R. 77; New York Negotiable Instruments Law, § 112.

²⁷ *Brathwaite v. Gardiner* (1846), 8 Q. B. 478; 115 E. R. (bankrupt); *Smith v. Marsack* (1848), 18 J. C. P. 66 (married woman before the Act of 1862); *Halifax v. Lyle* (1849), 9 Exch. 446; 154 E. R. (corporation having no power to issue bills).

²⁸ *Reeman v. Duck* (1848), 11 M. & W. 251; 152 E. R.; cf. *Smith v. Chester* (1787), 1 T. R. 654; 99 E. R.

²⁹ *Robinson v. Yarrow* (1817), 7 Taunt. 455; 129 E. R. (bill drawn and indorsed "per proc." without authority); *Garland v. Jacomb* (1878), L. R. 8 Ex. 216, Ex. Ch. (bill drawn and indorsed by partner in non-trading firm without authority of co-partner).

³⁰ *Daniel*, § 586; cf. *Drayton v. Dale* (1823), 2 B. & C. 298, at p. 299; 107 E. R.; New York Negotiable Instruments Law, § 112.

other material alteration be made in it, the acceptor is not precluded by this section from setting it up.³¹

The distinction between capacity and authority (p. 60) reconciles cases which otherwise appear to be in conflict. It is clear that capacity to draw must be identical with capacity to indorse, this being a question of status; while an authority to draw on behalf of another does not necessarily include an authority to indorse on his behalf.³²

Where the drawer of a bill payable to drawer's order was a fictitious person, it was said in some of the cases that the acceptor undertook to pay to an indorsement in the same handwriting as the drawer's signature³³; but, in other cases, it was said that the bill might be treated as payable to bearer.³⁴ S. 7 (8) of the Act adopts the latter view.

The acceptor can decline to pay on the ground that the payee's signature has been forged.³⁵ If, however, the payee be a fictitious person, the holder is entitled to treat the bill as payable to bearer. See s. 7 (8).

Liability of drawer.

55. (1) The drawer of a bill by drawing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, providing that the requisite proceedings on dishonour be taken³⁶;

³¹ *White v. Central National Bank* (1876), 64 New York R. 816; cf. *Burchfield v. Moore* (1854), 28 L. J. Q. B. 261; and s. 64 as to alterations.

³² Cf. *Prescott v. Flinn* (1832), 9 Bing. at p. 22; 181 E. R.; Indian Code, § 27.

³³ *Cooper v. Meyer* (1830), 10 B. & C. 468; 109 E. R.; *London & S. W. Bank v. Wentworth* (1880), 5 Ex. D. 96.

³⁴ *Beeman v. Duck* (1843), 11 M. & W. at p. 246; 152 E. R.; cf. *Phillips v. im Thurn* (1866), L. R. 1 C. P. at p. 471.

³⁵ See s. 24 and notes thereto; and cf. *Roberts v. Tucker* (1851), 16 Q. B. 560; 117 E. R.

³⁶ See *per* Lord Lyndhurst in *Siggers v. Lewis* (1834), 1 C. M. & R. at p. 871; 149 E. R. (cause of action); *per* Parke, B., in *Whitehead v. Walker* (1842), 9 M. & W. 508, at p. 516; 152 E. R. (dishonour by non-acceptance); *per* Lord Kingsdown in *Allen v. Kemble* (1848), 6 Moore P. C. at p. 321; 18 E. R. (set-off or compensation according to foreign law); *per* Cresswell, J., in *Jones v. Broadhurst* (1850), 9 C. B. at p. 181; 137 E. R. (payment by drawer); *per* Alderson, B., in *Gibbs v. Freemont* (1853), 9 Exch. at p. 30; 155 E. R. (measure of damages); and see note to s. 64 (1); *per* North, J., in *Re Commercial Bank of South Australia* (1887), 36 Ch. D. at pp. 525, 526 (measure of damages when bill dishonoured abroad).

Estoppels binding drawer.

- (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.³⁷

For "dishonour", see ss. 43 and 47; for express stipulations in the bill restricting the ordinary liability of the drawer, or releasing the holder from the performance of his ordinary duties, see s. 16; for measure of damages, see s. 57.

The drawer and indorsers of a bill are jointly and severally responsible to the holder for its due acceptance and payment.³⁸ If it be dishonoured the holder may enforce payment from the drawer, or an indorser, or the acceptor, or all or any of them at his option. The liability of the drawer of an accepted bill must in general be measured by that of the acceptor; since their relations for most, but not all, purposes resemble those of principal and surety.³⁹ See note s. 54 (1).

Liability of indorser.

- (2) The indorser of a bill, by indorsing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent⁴⁰ indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken⁴¹;

Estoppels binding indorser.

- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of

³⁷ *Collis v. Emmett* (1790), 1 H. Bl. 313; 126 E. R.; cf. *Phillips v. im Thurn* (1865), 18 C. B. (N.S.) 694, at p. 701; 144 E. R.; *Chamberlain v. Young*, [1893] 2 Q. B. 206, C. A., per Bowen, L.J.; cf. New York Negotiable Instruments Law, § 111.

³⁸ *Rouquette v. Oermann* (1875), L. R. 10 Q. B. 525, at p. 537; German Exchange Law, Arts. 8 and 49; Netherlands Code, Art. 146. By Art. 118 of the French Code the drawer and indorsers are "*garantis solidaires*" for the acceptance and payment of the bill.

³⁹ *Rouquette v. Oermann* (1875), L. R. 10 Q. B. 525, at pp. 536, 537.

⁴⁰ *I.e.*, subsequent in time and not merely in order of place on the bill. *National Sales Corp. v. Bernardi*, [1931] 2 K. B. 188; *McCall Bros. v. Hargreaves*, [1932] 2 K. B. 423.

⁴¹ *Snee v. Pompe* (1880), 30 L. J. C. P. at p. 78, per Byles, J.; cf. *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, at p. 18, per Lord Blackburn; German Exchange Law, Art. 18; cf. New York Negotiable Instruments Law, § 116.

the drawer's signature and all previous indorsements⁴²;

- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.⁴³

The indorser of a bill is in the nature of a new drawer,⁴⁴ that is to say, his relations with the holder resemble those of a drawer. "*Ce contrat*", says *Pothier*, No. 79, "*est entièrement semblable à celui qui intervient entre le tireur et le donneur de valeur.*" It is conceived that the words "according to its tenor" mean the tenor of the bill at the time of its indorsement, and not its tenor at the time it was drawn, if its effect has been varied, *e.g.*, by a qualified acceptance, or by an alteration of the sum payable: see sub-s. (b).⁴⁵ For measure of damages, see s. 57. By s. 89 (2) where the payee of a promissory note indorses it his liability resembles that of the drawer of an accepted bill payable to drawer's order.

If the holder in due course sue an indorser it is no defence to show that the drawer's or acceptor's signature has been forged, or that the amount of the bill was altered after issue and before indorsement, unless such alteration avoids the bill under the stamp laws.

Stranger signing bill liable as indorser.

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.⁴⁶

ILLUSTRATIONS

1. The holder of a bill already indorsed in blank, and therefore negotiable by mere delivery, indorses it, and passes it away. He thereby incurs the liabilities of an indorser.⁴⁷

⁴² *Ex p. Clarke* (1792), 3 Brown C. C. 288; 29 E. R.; *Thickness v. Bromilow* (1832), 2 Cr. & J. 425; 149 E. R.; *McGregor v. Rhodes* (1856), 6 E. & B. 266; 119 E. R.

⁴³ *Cf. Burchfield v. Moore* (1854), 23 L. J. Q. B. 261, as modified by s. 64; and New York Negotiable Instruments Law, § 116.

⁴⁴ *Penny v. Innes* (1834), 1 C. M. & R. at p. 441; 149 E. R., *per Parkes, B.*; *Steele v. M'Kinlay* (1880), 5 App. Cas. at pp. 767, 768, *per Lord Blackburn*; *cf. Burmester v. Hogarth* (1848), 11 M. & W. 97; 162 E. R.

⁴⁵ Compare, however, the *dictum* of Lush, J., in *Lebel v. Tucker* (1867), L. R. 3 Q. B. at p. 81, with the *dictum* of Alderson, B., in *Gibbs v. Fremont* (1853), 9 Exch. at p. 81; 156 E. R.

⁴⁶ *Steele v. M'Kinlay* (1880), 5 App. Cas. at pp. 772, 782. It is clear that signature intended only as receipt does not come within this rule; it is not indorsement, and the reason for its appearance demonstrates this. *Cf. Keane v. Beard* (1860), 8 C. B. (N.S.) at p. 882; 141 E. R., *per Byles, J.*, and s. 59; New York Negotiable Instruments Law, §§ 118—119, modify and elaborate the provisions of this section.

⁴⁷ *Cf. Fairclough v. Pavia* (1854), 9 Exch. at p. 695; 156 E. R.

2. A note is made payable to C or order. After issue D adds his signature thereto, to accommodate and guarantee the maker. D is not liable as a new maker,⁴⁸ but he is liable as an indorser, even if he write his name on the face of the note.⁴⁹

3. The payee of a *non-negotiable* note indorses it to D, who indorses it to the plaintiff. The plaintiff, it seems, cannot recover from D as an indorser, for the stamp is exhausted.⁵⁰

4. The drawer of a bill indorses it specially to the plaintiff. C afterwards backs it with his signature to guarantee the drawer, and then the plaintiff adds his indorsement. The plaintiff can recover from C as an indorser.⁵¹

5. A bill is drawn payable to drawer's order and accepted. C afterwards backs it with his signature. C is liable as indorser to subsequent parties [but parol evidence is not admissible to show that C intended to be liable to the drawer in case the bill was dishonoured. Such an agreement must be in writing to satisfy the Statute of Frauds].⁵² But see No. 8.

6. The drawer of a bill indorses it to C, who has undertaken to be answerable for the price of goods supplied to the acceptor. C then indorses the bill back to the drawer. The drawer, in his character of indorsee, can sue C as indorser.⁵³

7. C undertakes to guarantee a debt due from B to A. B signs a blank acceptance, and C adds his signature as indorser. The document is handed to A, who fills it up as a bill payable to drawer's order, inserting his own name as drawer. C, though an indorser, is liable to A, the drawer, on this bill.⁵⁴

8. A sells goods to B, and C undertakes to guarantee payment for them. A draws a bill on B payable to his own order, but does not indorse it. B accepts, and C then, before the goods are supplied, backs the bill with his signature and hands it back to A. If the bill is dishonoured A can complete it by making it payable to himself, and recover from C.⁵⁵

For the liability of an indorser, see s. 55 (2); see s. 16 for his power to vary his liability by express stipulation, which may perhaps be regarded as incorporated into s. 56.

An indorsement, properly so called, must be made by the holder; but when a person who is not the holder of a bill or note backs it with his signature, he is not an indorser, but a *quasi-indorser*. The law annexes to his act consequences similar to those which follow

⁴⁸ *Gwinnell v. Herbert* (1886), 6 N. & M. 723.

⁴⁹ *Ex p. Yates* (1858), 2 De G. & J. 191; 44 E. R., 27 L. J. Bk. 9. Qu. if he be liable to the payee, or only to subsequent parties. See *Steele v. M'Kinlay*, Illustration No. 5; and see No. 8.

⁵⁰ *Plimley v. Westley* (1885), 2 Bing. N. C. 249; 132 E. R.; but query now owing to s. 8 (4). In any event the plaintiff can sue on the consideration, although he has not given notice of dishonour.

⁵¹ *Penny v. Innes* (1834), 1 C. M. & R. 439; 149 E. R.; cf. *Young v. Glover* (1857), 8 Jur. (N.S.) 687, Q. B.

⁵² *Steele v. M'Kinlay* (1880), 5 App. Cas. 754, H. L., overruling, it seems, *Matthews v. Blowson* (1864), 33 L. J. Q. B. 209, but see *Macdonald & Co. v. Nash & Co.* [1924] A. C. 625, H. L., and *McCall, Ltd. v. Hargreaves*, [1932] 147 L. T. 257.

⁵³ *Wilkinson v. Unwin* (1881), 7 Q. B. D. 686, C. A.; distinguishing *Steele v. M'Kinlay*, *supra*. Cf. s. 87.

⁵⁴ *Glenie v. Bruce Smith*, [1908] 1 K. B. 263, C. A. If the bill had been drawn payable to bearer no question could have arisen. *Ibid.* at p. 269; followed *Re Gooch*, [1921] 2 K. B. 593, and approved *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 625, H. L.; but see § 114 of the New York Negotiable Instruments Law, and cases cited in Crawford's edition.

⁵⁵ *Macdonald & Co. v. Nash & Co.*, [1924] A. C. 625, H. L., distinguishing *Steele v. M'Kinlay*, *supra*, and distinguishing or disapproving *Shaw & Co. v. Holland & Co.*, [1918] 2 K. B. 15, C. A.; applied in *National Sales Corporation v. Bernardi* (1931), 47 T. L. R. 830.

the indorsement of a bill by the holder. Formerly, when a stranger to the bill backed it with his signature, a pleading difficulty arose as to whether he was to be described as an indorser or as a new drawer. The difficulty was, it is submitted, simply technical, for the consequences are identical. Now, it would be sufficient to state the facts or describe him as an indorser. By § 113 of the New York Negotiable Instruments Law, "a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity". This, too, is English law, *e.g.*, if a person writes a guarantee on a bill he is liable as a guarantor.⁵⁶ By § 114 of the New York Law, "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as an indorser in accordance with the following rules: (1) if the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee".

It is to be noted that if two or more persons indorse a bill or note, to accommodate the acceptor or maker, their relations *inter se* are those of co-sureties, and not of sureties in succession according to the order of their names on the bill.⁵⁷

Qu. as to the power of the Court to rectify a bill where the parties' names have been transposed by mistake.⁵⁸

Avals.—Such an indorsement as is referred to by this section would in continental countries be termed an "aval", which is said by Lord Blackburn to be an antiquated term signifying "under-writing".⁵⁹ According to *Pothier*,⁶⁰ an *aval* might be either on the bill itself or on a separate paper, and, if such an *aval* was given by anyone, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the *aval* was given, and under whose signature it was written. English and Scots law, as Lord Blackburn proceeds to point out, do not go so far as this. If a person not the holder indorse a bill, he is not a surety for the drawee or acceptor to the drawer; "such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take

⁵⁶ *Stagg and Mantle v. Brodrick* (1895), 12 T. L. R. 12.

⁵⁷ *Maddonald v. Whitfield* (1888), 8 App. Cas. 739, P. C.

⁵⁸ See *Matthews v. Blowsome* (1884), 38 L. J. Q. B. 209, as commented on in *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 774; *Druff v. Parker* (1888), L. R. 5 Eq. 181.

⁵⁹ *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 772.

⁶⁰ As cited by Lord Blackburn, *ubi supra*.

subsequently. It is not a collateral engagement, but one on the bill, and it is for that reason and because the original bill has incident to it the capacity of an indorsement in the nature of an *aval*, that such an indorsement requires *no new stamp*".⁶¹ But must not this statement be modified since the case of *Macdonald & Co. v. Nash & Co.*?⁶²

Nouguier, dealing with modern French law, defines an *aval* as "*une convention au moyen de laquelle un tiers, étranger à la lettre de change, se rend caution solidaire du paiement à l'échéance en faveur du tireur, de l'un des endosseurs ou de l'accepteur. Cet acte a reçu le nom d'aval parce qu'il signifie faire valoir*".⁶³

If a person undertakes, for a commission, to indorse the bills of another person, the holder should apply for the indorsement within a reasonable time.⁶⁴

Measure of damages against parties to dishonoured bill.

57. Where a bill is dishonoured,⁶⁵ the measure of damages, which shall be deemed to be liquidated damages,⁶⁶ shall be as follows:

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser⁶⁷—

(a) The amount of the bill:

⁶¹ *Steele v. M'Kinlay* (1880), 5 App. Cas. 754; see also at p. 782, *per* Lord Watson, and his comments thereon in *Macdonald v. Whitfield* (1883), 8 App. Cas. 783, at p. 748.

⁶² [1824] A. C. 625, H. L., Illustration No. 8.

⁶³ *Nouguier*, §§ 821—840; French Code, Arts. 141, 142. See also Spanish Code, Arts. 475—478; Netherlands Code, Arts. 130—132; Italian Code, Arts. 274—276, which regulate *avals* for their different countries.

⁶⁴ *Payne v. Ives* (1823), 3 D. & R. 664; 171 E. R.; discussed *Goring v. Edmonds* (1829), 6 Bing. 94, at p. 99; 180 E. R.

⁶⁵ See s. 43, dishonour by non-acceptance; s. 47, dishonour by non-payment.

⁶⁶ This enables the damages given by this section to be recovered under Order XIV. See *London and Universal Bank v. Clancarty*, [1892] 1 Q. B. 689 ("interest till payment or judgment"); *Lawrence v. Wilcocks*, [1892] 1 Q. B. 696, C. A. (noting and interest till payment); *Dando v. Boden*, [1893] 1 Q. B. 518 (notarial charges described in the writ as "bank charges"). At common law the expenses of noting an inland bill could only be recovered as special damages (*Rogers v. Hunt* (1854), 10 Exch. 478; 156 E. R.); see further the notes to Order III, rule 6, in the *Annual Practice*.

⁶⁷ But see *McCall, Ltd. v. Hargreaves*, [1932] 2 K. B. 428, and the cases cited therein.

- (b) Interest thereon from the time of presentment for payment if the bill is payable on demand,⁶⁸ and from the maturity of the bill in any other case⁶⁹ :
- (c) The expenses of noting, or, when protest is necessary,⁷⁰ and the protest has been extended, the expenses of protest.

ILLUSTRATIONS

1. Bill drawn in Tobago on London and accepted. The acceptor fails. The bill is remitted to Tobago and paid by the drawer. The drawer can recover the re-exchange from the acceptor as unliquidated damages.⁷¹

2. A bill is drawn in Australia by a bank there on its English branch, and is dishonoured in England. The holder can only claim interest at the English, and not the Australian, rate.⁷²

3. Bill drawn in Rio on England. The acceptor fails. The bill is protested for better security, and is then accepted and paid for the honour of the drawer by an English bank. The bank can only recover from the acceptor the damages given by the sub-section, and not the expenses of protest for better security or commission for accepting for honour.⁷³

4. Bill drawn in Switzerland on London. It is accepted and dishonoured by non-payment. The holder can recover the damages mentioned in sub-section 1, but is not entitled to recover commission, brokerage (courtage), stamps, or postage.⁷⁴

As to interest proper, reserved by the bill itself, see s. 9 (8). S. 57 (1) must be read subject to sub-s. (8), which gives the Court a control over interest. The bill must be produced at the trial to entitle the plaintiff to interest before writ.⁷⁵ In one case it was said that interest could only be recovered from the drawer or indorser from the time when he received notice of dishonour.⁷⁶ But that case must be regarded either as no longer law, or as a case where interest was under the special circumstances disallowed by the jury, as provided for by sub-s. 8. Since the Act it seems that when a bill is dishonoured by non-acceptance interest can only be recovered from the date of its maturity, and not from the date of its dishonour. This seems fair in principle, but perhaps does not accord with the practice before the Act.⁷⁷ By French Code, Art. 184,

⁶⁸ *Re East of England Banking Co.* (1868), L. R. 4 Ch. 14.

⁶⁹ *Lithgow v. Lyon* (1805), G. Coop. 29; 85 E. R.; *Lang v. Stone* (1826), 2 M. & Ry. 562.

⁷⁰ Foreign bill, not note. See s. 51 (3).

⁷¹ *Ex p. Roberts* (1888), 16 Q. B. D. 702, affirmed 18 Q. B. D. 286, C. A.; see note, and *Dacey's Conflict of Laws*.

⁷² *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

⁷³ *Ex p. Bank of Brazil, re English Bank of the River Plate*, [1898] 2 Ch. 438.

⁷⁴ *Banque Populaire de Bienne v. Cave* (1896), 1 Com. Cas. 67, per Mathew, J., in cases where sub-s. (1) applies the damages awarded by it are exhaustive.

⁷⁵ *Hutton v. Ward* (1860), 16 Q. B. 26; 117 E. R.

⁷⁶ *Walker v. Barnes* (1818), 5 Taunt. 240; 128 E. R.

⁷⁷ *Harrison v. Dickson* (1811), 8 Camp. 62, n.; 170 E. R.; cf. *Suse v. Pomps* (1860), 8 C. B. (n.s.) at p. 568; 141 E. R.

and Netherlands Code, Art. 195, interest accrues from the day of protest for non-payment. By German Exchange Law, Art. 50, interest accrues from the day of maturity. Interest in England has been usually calculated and allowed at the rate of 5 per cent.⁷⁸

The sub-section though general in terms appears to apply only to bills dishonoured at home.⁷⁹

The sub-section, moreover, is not exhaustive. It does not apply to the case of a foreign drawer or indorser who may be liable for re-exchange, when resorted to in his own country. But s. 97 saves the law merchant if not inconsistent with the Act. This makes good the *casus omissus*; therefore, when a foreign drawer has paid re-exchange, he may recover it from the English acceptor, and, if he is liable for re-exchange, he may prove for it in bankruptcy against the acceptor's estate before actual payment.⁸⁰

Re-exchange.

- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him the amount of the re-exchange with interest thereon until the time of payment.⁸¹

Bills dishonoured abroad fall exclusively under this sub-section. The holder cannot at his option claim under sub-s. 1.⁸²

It was formerly held that an English acceptor was not liable for re-exchange⁸³; but this rule, it appears, is no longer law.⁸⁴ "Re-exchange", in its usual application, means the loss resulting

⁷⁸ Mayne, *Damages*, 10th ed., p. 158. Cf. p. 190. *Qu.* 3 or 4 per cent. today?

⁷⁹ *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

⁸⁰ *Ex p. Roberts, re Gillespie* (1885), 16 Q. B. D. 702; affirmed, with reduction of amount, 18 Q. B. D. 286, C. A. According to the judgment of Cave, J., the object of the section is to fix the amount which may be inserted in a specially-indorsed writ as liquidated damages, and not to deprive any party of special damages. But see *contra*, per Mathew, J., in *Banque Populaire de Bienne v. Cave* (1895), 1 Com. Cas. 67, 69.

⁸¹ Cf. *Re Commercial Bank of South Australia* (1887), 36 Ch. D. at p. 538; Daniel, §§ 1444—1452; see the theory of re-exchange explained by Sup. Court of U. S. in *Bank of United States v. United States* (1844), 2 Howard, at p. 787.

⁸² *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

⁸³ *Napier v. Schneider* (1810), 12 East 420; 104 E. R.; *Woolsey v. Crawford* (1810), 2 Camp. 445; *Dawson v. Morgan* (1820), 9 B. & C. at p. 820; 109 E. R.

⁸⁴ *Ex p. Roberts* (1886), 16 Q. B. D. 702; affirmed 18 Q. B. D. 286, C. A.; *Re General South American Co.* (1877), 7 Ch. D. 637; *Pothier*, No. 117; *Story*, § 898; unless the cases be explained as resting on the special contract between drawer and drawee. This might reconcile the decisions, but does not appear to be the ground of decision.

from the dishonour of a bill in a country different from that in which it was drawn or indorsed.⁸⁵ The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour at the *then rate of exchange* on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realise at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour.⁸⁶ The expenses consequent on dishonour are the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn, the price of the stamp.⁸⁷

The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a "re-draft". The indorser who pays a re-draft may in like manner draw upon the antecedent party.⁸⁸ For example: A, in England, draws a bill for £100 on B in Calcutta, payable there at a rate of exchange indorsed thereon. This entitles the holder to receive (say) 1,000 rupees. The bill is dishonoured, and the expenses of protest, etc., come to ten rupees. The holder is then entitled to 1,010 rupees in Calcutta. At the time of dishonour sight bills on England are at 5 per cent. discount. Accordingly a sight bill on England for £106 1s. would realise in Calcutta 1,010 rupees. The holder may either draw a sight bill on A for £106 1s., and thus recoup himself, or he may sue A in England for £105 and interest, and £1 1s. expenses.

A custom according to which the holder may recover either the sum he gave for the bill or the re-exchange, at his option, is invalid⁸⁹; but a custom according to which a fixed rate of damages is substituted for re-exchange is probably valid.⁹⁰ In some countries a fixed rate is provided for by statute.⁹¹

The term "re-exchange" is used to signify (1) the amount of a re-draft; (2) the loss on a particular transaction occasioned by the exchange being adverse; (3) the course of exchange itself; or (4) the right to the sum which would be secured by a re-draft; so the context must always be looked to. When English law applies, the right to re-exchange arises on dishonour by non-acceptance, as well

⁸⁵ *Cf. Willans v. Ayers* (1877), 3 App. Cas. at p. 146, P. C.; and see *Mellish v. Simeon* (1794), 2 H. Bl. 378; 126 E. R. (cumulative re-exchange against drawer); *Suse v. Pompe* (1860), 8 C. B. (N.S.) 538, see at pp. 566, 567; 141 E. R.; French Code, Arts. 177—186.

⁸⁶ *De Tastet v. Baring* (1809), 11 East, at p. 269; 109 E. R.; *Suse v. Pompe* (1860), 8 C. B. (N.S.) at pp. 566, 567; 141 E. R.; German Exchange Law, Art. 50.

⁸⁷ *Re Commercial Bank of South Australia* (1887), 38 Ch. D. at p. 528.

⁸⁸ *Cf. Mellish v. Simeon* (1794), 2 H. Bl. 378; *Suse v. Pompe* (1860), 8 C. B. (N.S.) at p. 566; 141 E. R.; French Code, Art. 178; German Exchange Law, Art. 58.

⁸⁹ *Suse v. Pompe* (1860), 8 C. B. (N.S.) 538; 141 E. R.

⁹⁰ *Willans v. Ayers* (1877), 3 App. Cas. at p. 144, P. C.

⁹¹ Tobago, for example. See *Ex p. Roberts* (1886), 16 Q. B. D. 286, C. A.

as on non-payment.⁹² Under most continental codes it only arises on dishonour by non-payment. For the reason, see pp. 189 and 188. See the subject of re-exchange carefully worked out, German Exchange Law, Arts. 49—54; French Code, Arts. 177—186; *Nouguier*, §§ 1836—1866.

Control over interest.

- (3) Where by this Act interest may be recovered as damages, such interest may, if justice requires it, be withheld wholly or in part,⁹³ and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.⁹⁴

For example, if a valid tender has been made, interest might be withheld from date of tender, and if presentment for payment was delayed interest might be disallowed.⁹⁵ As to interest reserved by the bill itself, see s. 9 (1). Interest by way of damages has been given at 5 per cent., but 4 per cent. was recently given.⁹⁶

Transferor by delivery and transferee.

58. (1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery".

Holder is defined by s. 2; bill payable to bearer by s. 8 (8); and negotiation by s. 81. When a bill is transferred by delivery, the transaction is frequently spoken of in the cases as a sale of the bill. In mercantile phraseology sale has a different meaning; see p. 86.

Not liable on instrument.

(2) A transferor by delivery is not liable on the instrument.⁹⁷

⁹² Cf. *Suse v. Pompe* (1860), 8 C. B. (N.S.) at p. 566; 141 E. R.

⁹³ See rate reduced. *Ward v. Morrison* (1842), Car. & M. 186; 174 E. R.; and see per Cotton, L.J., in *Webster v. British Empire Co.* (1880), 15 Ch. D. at pp. 175, 176.

⁹⁴ *Keene v. Keene* (1857), 8 C. B. (N.S.) 144; 140 E. R.; cf. *Ackermann v. Ehrensparger* (1846), 16 M. & W. at p. 108; 168 E. R.; *Laing v. Stone* (1828), 2 M. & Ry. 562; 171 E. R.

⁹⁵ *Dent v. Dunn* (1812), 8 Camp. 296; 170 E. R. (tender); see, further, *Murray v. East India Co.* (1821), 5 B. & Ald. 204; 106 E. R. (holder dead and no demand of payment made); *Phillips v. Franklin* (1820), Gow 196; 17 E. R. (bill payable at particular place, and no demand there proved); cf. *Bann v. Dalzell* (1828), M. & M. 228; 173 E. R.

⁹⁶ *Re Commercial Bank* (1887), 36 Ch. D. at p. 529; *Keene v. Keene* (1857), 8 B. C. (N.S.) 144. See p. 188. *Riches v. Westminster Bank, Ltd.*, [1942] 2 A. E. R. 725.

⁹⁷ *Ex p. Roberts* (1798), 2 Cox 171; *Fenn v. Harrison* (1790), 3 T. R. 757; see also n. 28.

A transferor by delivery is not liable on the consideration in respect of which he has transferred the bill, if the bill be dishonoured,⁹⁸ unless (1) the bill was given in respect of an antecedent debt,⁹⁹ or (2) it appears that the transfer was not intended to operate in full and complete discharge of such liability,¹ or (3) the circumstances imply an indemnity against loss, *e.g.*, where A "obliges" B by cashing a cheque for B.²

The transferee, in order to avail himself of the above exceptions, must use reasonable diligence in endeavouring to obtain payment, and in giving notice of dishonour or repudiating the transaction.³ For example :—

1. D, the holder of a bill for £100, which has been indorsed in blank, discounts it with a banker for £90 without indorsing it. The bill is dishonoured. D is not liable to refund the £90.⁴

2. D changes a banker's note or cashes a cheque payable to bearer for the convenience of the holder. If the bank has stopped payment, or the cheque is dishonoured, D can recover the money.⁵

Warranty by transferor.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be,⁶ that he has a right to transfer it,⁷ and that at the time of transfer he is not aware of any fact which renders it valueless.⁸

⁹⁸ *Read v. Hutchinson* (1818), 3 Camp. 352; 170 E. R.; cf. *Van Wart v. Woolley* (1824), 3 B. & C. at p. 446; 107 E. R., Abbott, C.J.; *Evans v. Whyte* (1829), 5 Bing. 485; 130 E. R.

⁹⁹ *Ward v. Evans* (1703), 2 Ld. Raym. at p. 930; 92 E. R.; cf. *Camidge v. Allenby* (1827), 6 B. & C. at p. 362; 108 E. R., Bayley, J.; but *qu.* if this exception now applies to bank notes; *Guardians of Lichfield v. Greene* (1857), 26 L. J. Ex. at p. 142.

¹ *Van Wart v. Woolley* (1824), 3 B. & C. at p. 446; 107 E. R., Abbott, C.J.

² *Turner v. Stones* (1843), below, note 5.

³ *Rogers v. Langford* (1838), 1 Cr. & M. 642; 149 E. R.; *Moule v. Brown* (1838), 4 Bing. N. C. 266; 182 E. R.; *Robson v. Oliver* (1847), 10 Q. B. 704; 116 E. R.

⁴ *Bank of England v. Newman* (1700), 1 Ld. Raym. 442; 91 E. R.

⁵ *Turner v. Stones* (1843), 1 D. & L. 122, note; *Woodland v. Fear* (1857), 26 L. J. Q. B. 202; cf. *Timmings v. Gibbins* (1852), 18 Q. B. 722; 118 E. R. (notes paid into a bank and credited to customer).

⁶ *Gompertz v. Bartlett* (1853), 28 L. J. Q. B. 65 (bill void for want of stamp); cf. *Pooley v. Brown* (1862), 31 L. J. C. P. 184; *Leeds Bank v. Walker* (1863), 11 Q. B. D. 84 (altered bank note).

⁷ Story on Promissory Notes, § 118 (no English decision). Cf. New York Negotiable Instruments Law, § 115.

⁸ Cf. *Fenn v. Harrison* (1790), 3 T. R. at p. 759; 100 E. R.; *Delaware Bank v. Jarvis* (1859), 20 New York R. 298; *Bridge v. Batchelor* (1864), 92 Massachusetts R. 394.

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1. C discounts with D a bill payable to bearer without indorsing it. It turns out that, unknown to C, the amount of the bill had been fraudulently altered by a previous holder. D can recover from C the money he paid.⁹

2. A bill broker discounts with a bank a bill indorsed in blank by the payee. The indorser absconds, and the signatures of the drawer and acceptor turn out to be forgeries. The bank can recover from the bill broker the money they paid him.¹⁰

3. An agent gets a bank to discount a bill drawn and indorsed in blank by his principal, and then pays over the money to his principal. The signature of the acceptor was a forgery, but the agent did not know it. The drawer fails. The bank cannot recover from the agent.¹¹

4. The *bona fide* holder of a bill purporting to be drawn by A, accepted by B, and indorsed in blank by C, discounts it with a banker. It turns out that the signatures of A and B were forgeries, and that C, whose indorsement was genuine, is insolvent. The banker can recover from the holder the money he paid him.¹²

When the transferee discovers the defect in the bill he must repudiate the transaction with reasonable diligence.¹³

There is some confusion in the cases owing to a failure to distinguish between the warranty of genuineness and the liability on the consideration. The warranty of genuineness is an incident of the contract of sale, and, for this purpose, it is immaterial whether the thing sold be a bill or any other personal chattel. The transferor is for this purpose an ordinary vendor.¹⁴ In New York the warranty is more extensive than in England. The transferor of a note warrants the solvency of the maker at the time of transfer.¹⁵ The holder of a bill who presents it for payment, though he parts with the bill and gets the money, is not in the position of a vendor. He does not guarantee the genuineness of the instrument.¹⁶

Accommodation Party and Person Accommodated.

Contract of indemnity on accommodation bill.—When a person draws, indorses, or accepts a bill for the accommodation of another, the person accommodated impliedly engages (a) that he will provide funds for the payment of the bill at maturity; (b) that he will indemnify the accommodation party who is compelled to pay the

⁹ *Jones v. Ryds* (1814), 5 Taunt. 486; 128 E. R.; cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

¹⁰ *Fuller v. Smith* (1824), E. & M. 49; 89 E. R.

¹¹ *Ex p. Byrd* (1831), 4 De G. & S. 273; 64 E. R. Cf. *Gowers and others v. Lloyds and Nat. Proe. Foreign Bank, Ltd.*, [1887] 8 A. E. R. 55.

¹² *Gurney v. Womersley* (1864), 24 L. J. Q. B. 46; *Merriam v. Wolcott* (1861), 85 Massachusetts, R. 258.

¹³ *Pooley v. Brown* (1862), 81 L. J. C. P. 134.

¹⁴ *Meyer v. Richards* (1895), 165 N. S. R. at p. 405, Sup. Ct. U. S., reviewing English and American cases. By way of analogy, see s. 12 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and notes thereto in Chalmers's edition.

¹⁵ *Roberts v. Fisher* (1870), 43 New York R. 169; cf. New York Negotiable Instruments Law, § 115, and notes in Crawford's edition.

¹⁶ *Guaranty Trust Co. of New York v. Hannay* (1918), 28 Com. Cas. 599, 402, C. A.; [1918] 2 K. B. 623, 681, C. A.

bill through omission to provide the funds in accordance with the above first obligation.¹⁷ For example :—

1. B accepts a bill to accommodate the drawer. The drawer sends funds to B to provide for the bill, but becomes bankrupt before the bill matures. B can retain those funds for the purpose of paying the bill.¹⁸

2. A signs a bill as drawer to accommodate the acceptor. It is dishonoured. Although A receives no notice of dishonour, he pays half the amount of the bill to the holder. A cannot, it seems, recover this sum from the acceptor, for he has not paid under compulsion.¹⁹ But has he not paid, if not at the acceptor's request, at least to his use?

3. B accepts a bill to accommodate the drawer, but is not provided with funds to pay it. There is some *prima facie* defence against the holder. B is sued, defends the action, and has to pay the amount of the bill and costs. B can recover from the drawer the amount he paid, including the costs of defending the action.²⁰

4. A bill for £200, drawn abroad, is accepted for the accommodation of the first indorser. Acceptor and indorser fail. The holder gets £100 from the acceptor and £100 from the indorser. The indorser's estate pays 15s. in the pound. The acceptor, in proving on the contract of indemnity against the indorser, can get £50, which makes the total amount paid by the indorser on the bill (£150) to be at the rate of 15s. in the pound.²¹

Accommodation bill and accommodation party are defined, pp. 89—91. An accommodation party who is compelled to pay the bill has all the rights of an ordinary surety in such case, *e.g.*, he is entitled to the benefit of all securities held by the creditor.²² The Statute of Frauds does not require the contract of indemnity which arises out of an accommodation transaction to be in writing.²³

Where two or more persons become parties to a bill to accommodate some third party, their rights and liabilities between

¹⁷ *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; 133 E. R.; *Sleigh v. Sleigh* (1850), 5 Exch. at pp. 516, 517; 155 E. R., Parke, B.; cf. *Hawley v. Beverley* (1843), 6 M. & Gr. at p. 227; 134 E. R.; *Asprey v. Levy* (1847), 16 M. & W. 851; 153 E. R.

¹⁸ *Yates v. Hopps* (1850), 19 L. J. C. P. 180.

¹⁹ *Sleigh v. Sleigh* (1850), 5 Exch. 514; 155 E. R.; but see *Ex p. Bishop* (1880), 15 Ch. D. at pp. 410, 417, C. A.

²⁰ *Stratton v. Mathews* (1848), 3 Exch. 48; *Baker v. Martin* (1848), 3 Barb. 634, New York (accommodation indorser); cf. *Bagnall v. Andrews* (1830), 7 Bing. at p. 222; 181 E. R.; *Garrard v. Cottrell* (1847), 10 Q. B. 879; 116 E. R. After if the action be defended without reasonable cause; *Roach v. Thompson* (1830), M. & M. 487; *Beech v. Jones* (1848), 5 C. B. 606.

²¹ *Ex p. European Bank* (1871), L. R. 7 Ch. 108.

²² *Becherovaise v. Lewis* (1872), L. R. 7 C. P. at p. 377; *Gray v. Seckham* (1872), L. R. 7 Ch. 680.

²³ *Batson v. King* (1859), 4 H. & N. 739; 157 E. R.

themselves are those of co-sureties, and must be determined irrespective of the position of their names on the instrument.²⁴ For example : A bill is drawn by one person and indorsed by another for the accommodation of the acceptor. The drawer has to pay the bill. He can sue the indorser for contribution as a co-surety, though he could not sue him on the bill.²⁵ It is conceived that there is nothing in this rule inconsistent with the decision of the House of Lords in *Steele v. M'Kinlay*,²⁶ which merely decided that the drawer could not sue the indorser on the bill. The drawer there never suggested that he was entitled to contribution from the indorser as a co-surety.

²⁴ *Reynolds v. Wheeler* (1861), 30 L. J. C. P. 350; *Macdonald v. Whitfield* (1888), 8 App. Cas. 733, P. C.; cf. *Batson v. King* (1859), 4 H. & N. at p. 741; 157 E. R.; *McCall Bros. v. Hargreaves*, [1882] 2 K. B. 423; *National Sales Corp. v. Bernardi*, [1921] 2 K. B. 188.

²⁵ *Reynolds v. Wheeler* (1861), 30 L. J. C. P. 350.

²⁶ (1880), 5 App. Cas. 754; see, further, s. 56 and notes thereto.

Discharges

[*Discharge of Bill*—A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument.²⁷

A right of action on a bill must be distinguished from a right of action which a party to a bill may have arising out of the bill transaction, but wholly independent of the instrument. The former is transferred by negotiating the instrument, the latter is not, and may be incapable of being transferred. The former is extinguished by the discharge of the instrument, the latter may or may not be so. For example, if one of three joint acceptors pays a bill, it is discharged, but he personally has a right of contribution from his co-acceptors.²⁸ If an accommodation acceptor pays a bill it is discharged,²⁹ but he has a personal right of action for indemnity. If an acceptance be given for a debt, and the acceptance is paid, both the debt and the bill are discharged.

Discharge of Parties.—Again, the discharge of a bill must be distinguished from the discharge of one or more of the parties thereto, e.g., the acceptor may be discharged by a discharge in bankruptcy, while the drawer and indorsers are only liberated to the extent of the dividends or composition received by the holder³⁰; or a particular indorser may be discharged by want of notice of dishonour, while the drawer and other indorsers remain liable; or, again, an indorser may be discharged as regards a particular party, but not as regards subsequent parties.³¹]

Payment in due course.

59. (1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.³²

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.³³

Payment in due course.—No definition of payment is attempted, for “payment” is not a technical term.³⁴ The holder of a bill is entitled to receive money (cf. s. 8 (1) and s. 17 (2)), but when the

²⁷ *Harmer v. Steele* (1849), 4 Exch. 1; 154 E. R., Ex. Ch.; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; cf. *Burbridge v. Manners* (1812), 8 Camp. at p. 194 (payments); *Cundy v. Marriott* (1881), 1 B. & Ad. 698; 109 E. R. (stamp).

²⁸ *Harmer v. Steele* (1849), 4 Exch. at p. 14; 154 E. R.; see the converse, *Houle v. Baster* (1802), 3 East 177; 102 E. R.

²⁹ This statement was approved by Lord Atkin in *Coats v. Union Bank of Scotland*, [1929] S. C. (H. L.) 114.

³⁰ *Re Joint Stock Discount Co.* (1870), L. R. 10 Eq. 11; *Re Jacobs* (1875), L. R. 10 Ch. 211 (composition under Bankruptcy Act, 1869).

³¹ Cf. *O'Keefe v. Dunn* (1815), 6 Taunt. 315; 128 E. R.; and s. 48 (1).

³² *Morley v. Culkernall* (1840), 7 M. & W. at p. 182; 151 E. R., per Parke, B.; *New York Negotiable Instruments Law*, § 200. See, as to cheque, *Coats v. Union Bank of Scotland*, *supra*.

³³ See holder defined by s. 2; good faith by s. 90; and defect of title by s. 29 (2); see *New York Negotiable Instruments Law*, § 148.

³⁴ See *per Maule, J.*, *Mailard v. Argyll* (1843), 6 M. & Gr. at p. 45; 184 E. R.; cf. *Glascock v. Bull* (1889), 24 Q. B. D. at p. 16.

time of payment comes he may, if he chooses, receive satisfaction in any other form. Any satisfaction which would operate as a discharge in the case of an ordinary contract to pay money is equally effectual in the case of a bill.³⁵ Willes, J., seemed to think this principle hardly wide enough, having regard to the rule (s. 62) that accord without satisfaction may in some cases suffice³⁶; and note also section 68 (cancellation), and section 64 (alteration).

Completion of payment.—Payment by a banker to a private individual is complete, and the property in the money passes to the payee, when the money is laid on the counter.³⁷ As regards what constitutes complete and irrevocable payment between banker and banker where there is a clearing-house, see the special verdict in *Warwick v. Rogers*³⁸; where there is no clearing-house, see *Pollard v. Bank of England*.³⁹

Proceeding for costs.—Where the holder of a bill sues concurrently two or more of the parties thereto and is paid by one of them, he may still proceed against the others for costs incurred.⁴⁰

Presumption of payment.—It seems that there is a presumption of payment in the case of a bill or note which is twenty years old, quite apart from the Statute of Limitations.⁴¹

Part payment.—Part payment of a bill in due course operates as a discharge *pro tanto*.⁴² As to part payment by the drawer or an indorser, see p. 239. Under the continental codes the holder cannot refuse part payment; this is clearly not English law.

By whom payment must be made.—For payment to operate as a

³⁵ See, e.g., cases discussed on this basis: *Cripps v. Davis* (1848), 12 M. & W. 159; 152 E. R. (agreement to set off another debt); *Sibree v. Tripp* (1846), 15 M. & W. 28; 158 E. R. (negotiable bill for less amount); *Ford v. Beech* (1848), 11 Q. B. 852; 116 E. R., Ex. Ch. (agreement to suspend); *Ansell v. Baker* (1850), 15 Q. B. 20; 117 E. R. (merger); *Belshaw v. Bush* (1851), 11 C. B. 207; 136 E. R. (bill of third party); *Woodward v. Pell* (1868), L. R. 4 Q. B. 55 (debtor taken in execution). As to payment in bonds, see *Schroder's Case* (1870), L. R. 11 Eq. 131.

³⁶ Cf. *Cook v. Lister* (1868), 32 L. J. C. P. at p. 126; *Abrey v. Cruz* (1869), L. R. 5 C. P. at p. 44.

³⁷ *Chambers v. Miller* (1862), 32 L. J. C. P. 30.

³⁸ *Warwick v. Rogers* (1843), 5 M. & G. 340; 134 E. R.; and *London Banking Corp. v. Horsnail* (1898), 3 Com. Cas. 105, as to "bankers' payments".

³⁹ (1871), L. R. 6 Q. B. 623.

⁴⁰ *Randall v. Moon* (1859), 21 L. J. C. P. 226, as explained by *Cook v. Lister* (1868), 32 L. J. C. P. at p. 127; *London and Sub. Bank v. Walkinslaw* (1871), 25 L. T. 704.

⁴¹ Cf. *Brown v. Rutherford* (1880), 14 Ch. D. 687, C. A.

⁴² *Graves v. Key* (1882), 3 B. & Ad. 818; 110 E. R.; cf. *Cook v. Lister* (1868), 32 L. J. C. P. at p. 125, Willes, J.; French Code, Art. 126; German Exchange Law, Arts. 38, 39.

discharge of the bill it must be made by or on behalf of the drawee⁴¹ or acceptor.⁴² For example :—

1. A bill is accepted by three joint acceptors (not partners). One of them pays it at maturity. The bill is discharged and cannot be again negotiated. It is immaterial that the acceptor who paid accepted the bill for the accommodation of the other two.⁴³

2. A bill accepted payable at a bank and indorsed in blank by C is sent to D to collect at maturity. D improperly discounts it. To regain possession D goes to the acceptor's bankers, pays in the amount of the bill, and asks to have the bill given up to him, when the holder has been paid. This is done. The bill is not discharged. C can sue the acceptor.⁴⁴

3. C is the holder of a dishonoured bill indorsed in blank. D pays the amount and costs to C in order to get the bill and sue on it. C parts with the bill under the impression that D has paid it on behalf of the acceptor. The bill is not discharged. D can sue the drawer.⁴⁵

4. A joint and several note is paid at maturity by one of the makers. The note is discharged.⁴⁶

5. The payee of a note payable on demand takes also a mortgage to secure the debt. He then transfers the mortgage, getting the amount of the note. Afterwards he indorses the note to a holder in due course. The note has not thereby been paid and is enforceable by such holder.⁴⁷

By s. 89 provisions as to the acceptor of a bill apply, *mutatis mutandis*, to the maker of a note. Thus, discharge of the instrument in Illustrations 1 and 4 would not prejudice any right to contribution or indemnity against the co-acceptors or co-makers, for such right is independent of the instrument. Illustrations 2 and 3 exemplify the rule of English law, that payment of a debt by a stranger does not discharge it. In countries where the civil law prevails payment by a stranger operates as a discharge, according to the maxim, *Debitorem ignarum seu etiam invitum solvendo liberare possumus*.

To whom payment must be made.—Subject to the special provisions of the Act for the protection of bankers,⁴⁸ payment, in order to operate as a discharge, must be made to the holder, or some person authorised to receive payment on his behalf.⁴⁹

⁴³ *Wilkinson v. Simson* (1888), 2 Moore P. C. at p. 287; 12 F. R., Parks, B.

⁴⁴ *Callow v. Lawrence* (1814), 5 M. & S. at p. 97; 105 E. R., Lord Ellenborough; *Jones v. Broadhurst* (1850), 9 C. B. at p. 181, Cresswell, J.

⁴⁵ *Harmer v. Steele* (1849), 4 Exch. at pp. 13, 14; 164 E. R., Ex. Ch.; cf. *Bartrum v. Caddy* (1888), 9 A. & E. 276; 112 E. R. (note on demand paid by accommodation maker).

⁴⁶ *Deacon v. Stodhart* (1841), 2 M. & Gr. 317; 133 E. R.; *Thomas v. Fenton* (1847), 5 D. & L. 28, see at p. 38; cf. *Walter v. James* (1871), L. R. 6 Ex. 124; and sub-s. (2).

⁴⁷ *Lyon v. Maxwell* (1868), 18 J. T. 28; and sub-s. (2).

⁴⁸ *Beaumont v. Greathead* (1846), 2 C. B. 494; 114 E. R.

⁴⁹ *Glasscock v. Balls* (1889), 24 Q. B. D. 18, C. A.

⁵⁰ See s. 60 (forged indorsement on demand drafts); s. 80 (crossed cheques); and see s. 72 (2) and notes as to conflict of laws.

⁵¹ Cf. s. 45 (3), presentment for payment; *Lefley v. Mills* (1791), 1 T. R. at p. 175; 128 E. R.; *Walker v. Macdonald* (1818), 2 Exch. at p. 532; *Roberts v. Tucker* (1851), 16 Q. B. at p. 569, Ex. Ch.; Pothier, Nos. 164—167; Nouguiet, § 889. See also s. 7 (3), and s. 24.

See "holder" defined by s. 2 and "good faith" defined by s. 90. For example :—

1. A bill is indorsed payable to John Smith or order. Another person of the same name gets the bill and presents it. The acceptor pays him. The bill is not discharged. The acceptor is still liable to the real John Smith.⁵²

2. A bill indorsed in blank is stolen. The thief presents it to the acceptor at maturity, and obtains payment. If the acceptor pays him in good faith the bill is discharged, for the thief is the holder.⁵³

3. The indorsee of a bill who has obtained it by fraud presents it at maturity to the acceptor, who pays in good faith. The bill is discharged.⁵⁴

As to lost bills, see s. 70; and, for bills in sets, see s. 71 (5) and (6). Where a bill is held wrongfully the acceptor may set up the *jus tertii* (pp. 55, 96, 98). If he merely suspects that bill to be held wrongfully he will act at his peril.

Holder's identity.—Under some continental codes, when a bill is payable specially, and the holder is unknown to the payer, he is bound to give some proof of identity: *Nouguier*, § 896; this appears to be also the law in the United States.⁵⁵ In England it is conceived that possession is *prima facie* evidence of identity,⁵⁶ and that if the payer doubts the identity of the person presenting, or the genuineness of the instrument, he must pay or refuse payment at his own risk. There is a *dictum* by Maule, J., that in such case the payer would be allowed a reasonable time to make inquiry⁵⁷; but having regard to the duties of the holder this seems very questionable. The usual practice is to offer to pay under an indemnity.

At what time.—Payment, to operate as a discharge, must be made at or after the maturity of the instrument.⁵⁸ Payment by the drawee or acceptor before maturity operates as a mere purchase of the instrument, and, subject to s. 61, he may, if the form of the bill permit, re-issue, and further negotiate it.⁵⁹ Premature payment, or any other premature discharge, is of course valid *inter partes*. Thus :—

1. Accepted bill payable three months after date. A month before it matures the holder indorses it for value to the acceptor. The next day the acceptor indorses it to D. D can sue all parties to the bill.⁶⁰

⁵² See s. 24, and *Graves v. American Bank* (1856), 17 New York R. 205; cf. *McEntire v. Potter* (1889), 22 Q. B. D. at p. 441.

⁵³ *Smith v. Sheppard* (1778), cited Chitty on Bills, 10th ed., p. 180, n.

⁵⁴ Cf. *Roberts v. Tucker* (1851), 16 Q. B. at p. 576; 117 E. R.

⁵⁵ Daniel, § 1618. It certainly is the practice.

⁵⁶ Cf. *Bulkeley v. Butler* (1824), 2 B. & C. at p. 441; 107 E. R., per Bayley, J.

⁵⁷ *Roberts v. Tucker* (1851), 16 Q. B. at p. 578; 117 E. R.; cf. Paget on Banking, 4th ed., p. 182.

⁵⁸ *Burbridge v. Monners* (1812), 3 Camp. at p. 194; 170 E. R.; *Beaumont v. Greathead* (1846), 2 C. B. 494; 185 E. R. (note); French Code, Arts. 144—146.

⁵⁹ *Morley v. Culverwell* (1840), 7 M. & W. 174; see at p. 182, Parke, B.; 151 E. R.; *Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244; cf. German Exchange Law, Art. 10.

⁶⁰ *Ibid.*

2 An accepted bill payable three months after date is held by C. A month before it matures the acceptor pays C, but C retains the bill. The next day C indorses it to D, who takes it for value and without notice of the payment D can sue the acceptor.⁶¹ *Aliter*, if the bill had been payable one month after maturity.

3 The acceptor of a bill settles with a drawer before the bill matures. It turns out that the bill was outstanding in the hands of a third party. The acceptor must pay the holder, but can recover the amount from the drawer as money paid to his use.⁶²

Payment by drawer or indorser.

(2) Subject to the provisions hereinafter contained,⁶³ when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor,⁶⁴ but may not re-issue the bill.⁶⁵

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.⁶⁶

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1 The acceptor of a bill, originally payable to drawer's order, dishonours it. The drawer pays the holder and gets the bill. He may either sue the acceptor himself, or he may strike out his own and the subsequent indorsements and again negotiate the bill away.⁶⁷

2 The acceptor of a bill becomes bankrupt. C, a holder of the bill, who had indorsed it away before the bankruptcy, takes it up after the bankruptcy. C can set off the bill against any claim the acceptor's trustee may have against him.⁶⁸

3. The C Bank discount a bill, which is accepted payable at then house, and then indorse it away. At maturity it is presented to the O Bank and paid. It is a

⁶¹ Cf. *Dod v. Edwards* (1827), 2 C. & L. 602; 172 E. R. (premature release); French Code, Art 144; *Cripps v. Davis* (1843), 12 M. & W. 159; 152 E. R., *Ingham v. Primrose* (1859), 7 C. B. (N.S.) 82; 141 E. R.

⁶² *Hawley v. Beverley* (1843), 6 M. & Gr. 221; 134 E. R.

⁶³ See sub s. (3) as to accommodation bills.

⁶⁴ I.e., if he is not an accommodation acceptor for the drawer (s. 50 (3)).

⁶⁵ Cf. *Williams v. James* (1850), 15 Q. B. at p. 505; 117 E. R. *Aliter* in America if payee had indorsed in blank: *Daniel*, § 1240; *Gardner v. Maynard* (1868), 89 Massachusetts. R. 456; cf. New York Negotiable Instruments Law, § 202.

⁶⁶ *James v. Broadhurst* (1850), 9 C. B. 173; 137 E. R.; *Kemp v. Balls* (1854), 10 Exch. 607; *Woodward v. Pell* (1868), L. R. 4 Q. B. 55; cf. New York Negotiable Instruments Law, § 202.

⁶⁷ *Callow v. Lawrence* (1814), 3 M. & S. 95; 105 E. R.; *Hubbard v. Jackson* (1827), 4 Bing. 390; *Elsworth v. Brewer* (1831), 28 Massachusetts. R. 315.

⁶⁸ *McKinnon v. Armatrang* (1877), 2 App. Cas. at p. 589, H. L.

question of fact whether they paid as the agents and bankers of the acceptor, or whether they took up the bill as indorsers. In the latter case it is not discharged, and they can sue the drawer, or if he be a customer, debit him with the amount of the bill.⁶⁹

4. The indorser of a bill writes to the drawer promising to "retire" it, and accordingly takes it up before maturity. The bill is not discharged.⁷⁰

The House of Lords has held that the drawer or indorser paying a bill is a *quasi-surety* for the acceptor, and that the analogy is sufficiently close to entitle him to the benefit of any securities deposited by the acceptor with the holder, and retained by the holder at the time of the dishonour of the bill.⁷¹ Suppose the drawer or indorser after payment again indorses the bill away. Who would then be entitled to the benefit of the securities? This raises a difficulty not adverted to in the case.

When a bill is paid wholly or in part by the drawer or by an indorser, and the holder retains possession of the bill, he holds it as trustee for such drawer or indorser, as regards the amount received⁷²; provided that, when the acceptor of a bill becomes bankrupt, any payment made by the drawer or an indorser to the holder must be deducted from the amount for which the holder is entitled to prove against the acceptor's estate.⁷³

The right of the holder to retain the bill when he has been paid by the drawer or an indorser depends on the arrangement between them.⁷⁴ In France and other countries where the civil law is followed, payment by the drawer or an indorser discharges the bill. See *Pothier*, No. 106.

Payment of accommodation bill.

(8) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

ILLUSTRATION

A bill is accepted for the accommodation of the drawer. The drawer negotiates the bill, and then takes it up at maturity. Subsequently he re-issues it. The holder cannot sue the acceptor for the bill is discharged.⁷⁵

⁶⁹ *Pollard v. Ogden* (1853), 2 E. & B. 459; 118 E. R.

⁷⁰ *Elsam v. Denny* (1854), 15 C. B. 87; see at p. 94 as to the meaning of "retire", but see a different construction put on the term, *Ex p. Reed* (1872), L. R. 14 Eq. at p. 598.

⁷¹ *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, H. L.

⁷² *Jones v. Broadhurst* (1850), 9 C. B. at p. 183; 137 E. R.; *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, Willes, J.; *Thornton v. Maynard* (1875), L. R. 10 C. P. 696. See p. 124. as to the effect of this if holder sues.

⁷³ *Ex p. Taylor* (1857), 26 L. J. Bk. 58; *Ex p. Maxoudoff* (1868), L. R. 6 Eq. 582.

⁷⁴ *Jones v. Broadhurst* (1850), 9 C. B. at p. 183; 137 E. R.; cf. *Woodward v. Pell* (1868), L. R. 4 Q. B. 55, as to a lien for costs; and *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. at pp. 17, 18.

⁷⁵ *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, Willes, J.; see also *Lazarus v. Cowie* (1842), 3 Q. B. 459; 114 E. R., criticised but followed in *Jewell v. Parr* (1853), 18 C. B. 909; 138 E. R., apparently approved *Parr v. Jewell* (1855), 16 C. B. 684, at p. 709; 139 E. R., Parkes, B., Ex. Ch.; *Jones v. Broadhurst*

See note to s. 28, defining "accommodation bill". The discharge may be supported on the ground adopted by Willes, J., that the person accommodated pays as the acceptor's agent, or on the ground that the bill has been paid by the party ultimately liable. See p. 216, as to principal and surety; and s. 36 (2), as to equities attaching to overdue bill.

The payor can therefore obtain a good discharge although he has paid the money due on the instrument under the mistaken belief that the payee was entitled to payment. Whether he can in such a case (if he choose so to do), or in the other cases (where he gets no discharge), recover the payments made by mistake is a question which is part of the difficult general problem of recovery of money paid by mistake. There is so much difference of opinion on the nature of the action for, and the basic principle governing, the recovery of money so paid, as well as on the formulation and scope of the rules themselves, that no attempt will be made here to deal comprehensively with the topic.⁷⁶

Recovery by Payor of Money Paid by Mistake.

Where payment of a bill or note is made by mistake to one not entitled to receive payment, and who cannot give a discharge, the money so paid may be recovered back by the payor as follows:—

- (1) The payor of a forged, altered, or cancelled bill, who has been directly induced to pay it by the negligence of his correspondent or customer, and has not himself been guilty of negligence, can recover the money so paid from such correspondent or customer. For example:—

1. A draws a cheque on his bankers for £50, carelessly leaving a blank space before the words and figures "fifty". The holder fills it up as a cheque for £150 and obtains payment. The banker can charge A with the amount so paid.⁷⁷

2. A draws in the ordinary way a cheque for £50. It is altered to £150. The alteration is not apparent. A's banker pays it. He can only charge A with £50.⁷⁸

3. A cheque for £10 is drawn on a joint account by three trustees. A space is left before the words and figures "ten", and one of the trustees fraudulently fills it up as a cheque for £110, and gets the money. *Quære* whether the bank cannot charge the joint account with the £110.⁷⁹

4. A draws a bill on B, and indorses it in blank. Subsequently, intending to cancel it, he tears it into four pieces and throws the pieces away. C picks

(1850), 9 C. B. at pp. 181 and 180; 137 E. R.; *Ralli v. Dennistoun* (1851), 6 Exch. 488, 36th plea and judgment at p. 493; 155 E. R.; *Strong v. Foster* (1855), 17 C. B. at p. 222; 139 E. R.; *Re Oriental Bank* (1871), L. R. 7 Ch. at p. 102; New York Negotiable Instruments Law, §§ 200, 202.

⁷⁶ See Pollock, *Contracts*, 11th ed., p. 381, note.

⁷⁷ *Young v. Grote* (1827), 4 Bing. 253. This case has continually been criticised. See Illustration 3, and *Schofield v. Londesborough*, [1895] 1 Q. B. 536, C. A.; and [1896] A. C. 514, H. L. But its authority has now been established by the House of Lords in *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777.

⁷⁸ *Hall v. Fuller* (1826), 5 B. & C. 760; 108 E. R.

⁷⁹ *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 565, P. C.; criticised *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777, H. L. See p. 212.

up the pieces, pastes them together, and presents the bill to B and obtains payment. If the marks of cancellation are apparent B cannot recover the money so paid from A.⁸⁰

5. Bill accepted to accommodate the drawer. The drawer having failed to discount it, the acceptor tears it in half and throws the pieces into the street. The drawer picks up the pieces in the acceptor's presence, and afterwards joins them together, and negotiates the bill. The bill looks as if it might have been divided for safer transmission by post. The acceptor is (perhaps) liable to a holder in due course.⁸¹

6. A bill held under a forged indorsement is presented to B for acceptance. B accepts it payable at his bankers. The bankers pay it. They cannot charge B with the amount.⁸²

There had grown up a tendency to minimise the effect of negligence on the part of the customer or correspondent.⁸³ But the House of Lords has now confirmed the old doctrine that the customer is bound to use reasonable care, so that frauds on the banker are not facilitated by the customer's acts or omissions in regard to the making and drawing of cheques.⁸⁴ The duty is so far limited to the drawing and signing of the cheque: it does not extend to care in the choice of servants or in the custody of cheque books, etc. However, it does appear that a customer should at once inform his bank of any forgery of his signature to cheques.⁸⁵

- (2) A banker who, as drawee, pays a genuine cheque held under a forged or unauthorised indorsement, can recover the money so paid from his customer, the drawer, or debit such customer's account with it.⁸⁶
- (8) The payor can recover the money paid from the person who received it when such person did not act *bona fide* in demanding payment of the bill.⁸⁷
- (4) Where the person paid acted *bona fide* in receiving the money the legal position is not susceptible of expression in a simple proposition or in a comprehensive series of simple rules. The following generalisations are offered, followed by examples from cases. The generalisations are in diminishing order of authority.

⁸⁰ *Scholey v. Ramsbottom* (1810), 2 Camp. 485; 170 E. R.; see p. 98, and ss. 29 & 68.

⁸¹ *Ingham v. Primrose* (1859), 7 C. B. (N. S.) 82; 141 E. R., often criticised, but said by Collins, M.R., "to be sound in principle if wrong on the facts" (*Nash v. De Freville*, [1900] 2 Q. B. 72, at p. 89).

⁸² *Roberts v. Tucker* (1861), 16 Q. B. 560, Ex. Ch.; cf. *Vaghano's Case*, [1891] A. C. at pp. 117, 181.

⁸³ Cf. *Kepitigalla and Rubber Estate Co. v. National Bank of India*, [1909] 2 K. B. 1010, 1025 (entries in pass-book); *Colonial Bank of Australasia v. Marshall*, [1906] A. C. at p. 568, P. C.

⁸⁴ *London Joint Stock Bank v. MacMillan*, [1918] A. C. 777, H. L. (altered cheque); *Greenwood v. Martin's Bank* (1881), 47 T. L. R. 607. Negligence of customer in leaving a space on cheque negatived in *Slingsby v. District Bank*, [1892] 1 K. B. 544.

⁸⁵ *Greenwood v. Martin's Bank*, [1883] A. C. 51; *Slingsby v. District Bank*, *supra*.

⁸⁶ S. 80, and 16 & 17 Vict. c. 59, s. 19, p. 340.

⁸⁷ *Martin v. Morgan* (1819), 8 Moore 695; *Kendal v. Wood* (1871), L. R. 6 Ex. 248,

- (a) A collecting banker receiving the proceeds of a crossed cheque is protected from successful action by the true owner under the provisions of s. 82.
- (b) A person presenting in good faith a bill for payment does not warrant its genuineness or authenticity.⁸⁸
- (c) Where the payor was guilty of negligence in making the payments, he has no right to recover, since he cannot base his claim on a mistake which was due to his own wrongdoing or carelessness.
- (d) The money cannot be recovered from the payee if the payee's position has been prejudiced in the interval between the payment and the discovery of the mistake and the demand for repayment.⁸⁹ The difficulty is to apply this rule to bills and notes.

Mathew, J., gave his opinion that in the case of a bill or note the position of the holder is necessarily prejudiced if he has received the money and the mistake is not immediately corrected. "When a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once it may be that the money can be recovered back."⁹⁰ The Privy Council, in a later case, say that the rule so stated must, at any rate, be confined to the case of bills and notes on the dishonour of which notice has to be given to someone, whether drawer or indorser, who would be discharged unless the notice were given in due time.⁹¹ There is an obvious desirability for finality in the payment of negotiable instruments. "This desire for finality is illustrated by the familiar rule that the holder of the bill or note is entitled to know at once on presentment if he is going to be paid" (Lord Wright, *Legal Essays and Addresses*, pp. 41—42).

- (e) If the basis upon which money paid by mistake is recoverable is the principle that it is against conscience to retain it or that the payee has gained an unjust enrichment, then it is very difficult, if not impossible, to see when and why a holder in due course receiving payment (or a holder claiming through him) should ever be called upon to repay. The following examples go some way to substantiate the above statements:—

1. A cheque is presented and paid. Directly after the payment the bankers

⁸⁸ *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 828; *Greenwood v. Martin's Bank*, [1903] A. C. 51.

⁸⁹ *Kerrison v. Glyn, Mills & Co* (1911), 17 Com. Cas. 41, at p. 54, H. L.

⁹⁰ *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q. B. 7, at p. 11; criticised Daniel, 5th ed., § 1872.

⁹¹ *Imperial Bank of Canada v. Bank of Liverpool*, [1908] A. C. 49, at p. 58, P. C. For the general rule, see *Kerrison v. Glyn, Mills & Co.* (1911), 17 Com. Cas. at p. 54, H. L.

2. A cheque is drawn payable to C's order, and handed to an agent of C's in payment of a debt due to C. The agent, who has authority to receive payment but not to indorse cheques, indorses it for C, signing "per S. K., agent," obtains payment and keeps the money. The loss falls on C. He has no remedy against the drawer or the bankers.¹³

3. A crossed cheque payable to order is stolen from the payee. The thief forges his indorsement, and the bank on which it is drawn pays it in contravention of the crossing. The bank cannot debit the drawer's account with the cheque.¹⁴

4. The manager of a bank is appointed treasurer to a board of guardians, and the terms of the arrangement are such as to make the guardians' account practically an account with the bank. Cheques drawn by the guardians on the treasurer are cheques drawn on a banker within the meaning of this section.¹⁵

5. The defendant bank had the plaintiffs and their servant as customers. The servant stole cheques drawn by the plaintiffs, forged indorsements, and paid the cheques into his own account. Consequently the bank acted in two capacities when dealing with the cheques, i.e., as collecting bank and as paying bank. Held, although in the circumstances the bank would have been protected by s. 60, s. 82 afforded no protection in the face of a finding of negligence against the bank; and the plaintiffs recovered the proceeds of the cheques.¹⁶

This section constitutes an exception to s. 24. It does not protect the banker when the drawer's signature has been forged.¹⁷ The cases cited in the illustrations were decided upon the Stamp Act, 1858 (16 & 17 Vict. c. 59, s. 19, p. 840), which is reproduced in this section so far as it relates to bills or cheques. That enactment, however, was not repealed, as it applies to certain "drafts and orders", which are not bills as defined by s. 8 of the Bills of Exchange Act. It is to be noted that the 16 & 17 Vict. c. 59 was a Stamp Act which appeared to apply only to inland bills. Possibly, therefore, s. 19 does not cover the case of a draft drawn abroad.¹⁸ There is no such limitation in the present section.

A draft drawn by one branch bank on another is not a bill of exchange within the meaning of s. 60 of the Bills of Exchange Act, but it is a draft or order within the meaning of 16 & 17 Vict. c. 59.¹⁹

the amount from the person who presented it: *Ogden v. Benas* (1874), L. R. 9 C. P. 513. He clearly can, cf. *Vinden v. Hughes*, [1905] 1 K. B. 795; *Carpenters Co. v. British Mutual Bank*, [1908] 1 K. B. 511.

¹³ *Charles v. Blackwell* (1877), 2 C. P. D. 151, C. A.; cf. *Bissell v. Fox* (1885), 53 L. T. 198, C. A. The cheque is equated with a payment in cash.

¹⁴ Cf. *Smith v. Union Bank* (1875), L. R. 10 Q. B. at p. 296; *ibid.* 1 Q. B. D. at p. 35, per Lord Cairns. Such payment would not be "in the ordinary course of business". As to the payee's remedy, see s. 79 (2); and *Bobbett v. Pinkett* (1876), 1 Ex. D. 368, 372.

¹⁵ *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. 188, 198, decided on 17 & 18 Vict. c. 59.

¹⁶ *Carpenters Co. v. British Mutual Bank*, [1908] 1 K. B. 511. Greer, J.J., said that s. 60 protects a bank only when that bank is merely a paying bank, and is not a bank which receives the cheque for collection; MacKinnon, L.J., was of opinion that the cheques were in last analysis paid by the bank to the servant since they were not paid to a bank collecting for him; but for the purposes of the act the bank must be treated as if it had paid to a banker.

¹⁷ Cf. *Orr v. Union Bank* (1864), 1 Macq. H. L. Ca. 513.

¹⁸ But see *Capital and Counties Bank v. Gordon*, [1908] A. C. at p. 251, per Lord Lindley.

¹⁹ *Capital and Counties Bank v. Gordon*, [1908] A. C. 240; 72 L. J. K. B. 451, H. L. In *Slingsby v. Westminster Bank* (No. 1), [1901] 1 K. B. 178, a War Loan dividend warrant drawn on the Bank of England and signed by an official of

By s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), the provisions of s. 60 are extended to "any document issued by the Accountant-General in pursuance of this Part of this Act (i.e., Part VI, Funds in Court) which authorises the payment of money".

For the crime of forging an indorsement, see s. 2 (2) of the Forgery Act, 1918 (8 & 4 Geo. 5, c. 27).

The United States adhere to the common law rule, and have no corresponding enactment. Under the continental codes generally the payor is not bound to verify the genuineness of the indorsements, and in some countries a *bona fide* holder can make good a title through even a forged indorsement; see s. 72 (2) and notes thereto, as to the effect of this conflict of laws.

Acceptor, the holder at maturity.

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.²⁰

ILLUSTRATIONS

1. A bill payable after date is accepted by three joint acceptors. The holder indorses the bill before maturity to one of the acceptors. If that acceptor retains the bill till it matures, it is discharged.²¹

2. The maker of a note payable on demand dies, having appointed the holder his executor. The note is not discharged unless the holder has assets available for the payment of it.²²

3. B makes three notes payable to C or order, and subsequently gives C two more notes in substitution for the first three, and to cover further advances. All the notes are payable on demand, and were given on the understanding that they should not be negotiated. C indorses all the notes to D. After C has indorsed the notes, B pays C the amount due on the last two notes. Afterwards C obtains the five notes from D by fraud, and hands them to B, the maker. D can recover from B on these five notes.²³

As to "discharge", see p. 195. At common law, if the acceptor or maker becomes the administrator of the holder, the bill or note is not discharged²⁴; but if he becomes the executor of the holder, it is discharged.²⁵

the bank was held to be a cheque, because in signing, the official was acting as the agent of Government. *Ross v. L. C. and Westminster Bank*, [1919] 1 K. B. 678, was doubted.

²⁰ New York Negotiable Instruments Law, § 200.

²¹ *Harmer v. Steele* (1849), 4 Exch. 1; 154 E. R., Ex. Ch.; but this does not prejudice his right to contribution (*ibid.* at p. 18); cf. *Mainwaring v. Newman* (1880), 2 B. & P. 120; 126 E. R.; *Foster v. Ward* (1888), 1 C. & E. 168 (two firms with common partner); *Neale v. Turton* (1827), 4 Bing. 149; see, too, *Richards v. Richards* (1881), 2 B. & Ad. 447; 109 E. R., before the Married Women's Property Acts.

²² *Lowe v. Peckett* (1855), 16 C. B. 500; 139 E. R.

²³ *Nash v. De Freville*, [1900] 2 Q. B. 72, C. A.

²⁴ Williams on Executors, 7th ed., p. 1818.

²⁵ *Freakeley v. Fox* (1839), 9 B. & C. 180; 109 E. R.; though he had to account for this amount as assets, Williams on Executors, 12th ed., 1159. In the last edition

The rule stated in the section is a deduction from the general principle that a present right and liability united in the same person cancel each other: "There is no principle", says Best, C.J., "by which a man can be at the same time plaintiff and defendant".²⁶ This mode of discharge is called in the civil law *confusio*, and is recognised in all countries where the law is founded on civil law: see, e.g., as to France, *Nouguier*, §§ 1061—1065.

Express waiver or renunciation.

62. (1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.²⁷

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity,²⁸ but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.²⁹

Maturity is nowhere defined in the Act, but s. 14 sets out the rules for computing the time of payment of all bills not payable on demand. Any renunciation of rights by the holder before that date presumably does not discharge the bill. A bill payable on demand is never immature; it is always mature until it is overdue. It must be noticed that the proviso in sub-s. (2) in favour of the holder in due course applies not only to the cases comprised in the subsection but to those covered by the whole section, i.e., to the cases in sub-s. (1) also.

ILLUSTRATIONS

1. The holder of a bill at maturity tells the acceptor that he renounces all claims against him, and gives up the bill to him. The bill is discharged.³⁰

of this work it was suggested that the words "in his own right" negatived the common law rule as to executors. But it appears from the case of *Jenkins v. Jenkins*, [1928] 2 K. B. 501, that the old rule is still in force and that an executor who becomes the holder, *qua* executor, of his own note is discharged and cannot, even as executor, sue his co-debtors on the note.

²⁶ *Neale v. Turton* (1827), 4 Bing. at p. 151; 180 E. R. (drawer suing on bill accepted by firm of which he was a member); but the rule no longer applies as between a partner and his firm, or two firms with a common partner, since the Judicature Acts. See R. S. C., Ord. 48, rule 10.

²⁷ *Dingwall v. Dunster* (1779), 1 Dougl. 247; 99 E. R., Lord Mansfield; cf. *Cook v. Lister* (1863), 32 L. J. C. P. at p. 126, *per* Willes, J.; Pothier, Nos. 175—183.

²⁸ *Foster v. Dawber* (1851), 6 Exch. 839, at pp. 851, 852; 185 E. R., Parke, B.; Pothier, Nos. 175—183.

²⁹ See "holder in due course" defined by s. 20; and see *Ingham v. Primrose* (1859), 7 C. B. (N.S.) 82; 141 E. R.; and New York Negotiable Instruments Law, § 208.

³⁰ *Whatley v. Trieker* (1807), 1 Camp. 35; 170 E. R.; and *Foster v. Dawber*, *supra*.

2. The holder of a bill before it matures writes to the first indorser that he renounces all claim against him. The first and subsequent indorsers are discharged as regards such holder. The drawer and acceptor are not.³¹

3. The holder of a bill orally agrees with the drawer that he will not exercise his right of recourse against him if a certain event takes place. The event happens. The drawer is not discharged, for this is merely an oral agreement to vary the effect of a bill as drawn, and not an absolute waiver of the drawer's liabilities.³²

4. The holder of a note payable on demand, being in a dying state, says that he wishes to forgo the debt, and by his directions a memorandum is drawn up to the effect that the note is to be destroyed as soon as it can be found. This is only the expression of an intention to cancel it, and does not operate as a renunciation.³³

5. B makes a note in favour of C, who has lent him money. C afterwards hands the note to X, who is a devisee under B's will, and verbally renounces his rights. This is not a discharge.³⁴

6. B makes a note in favour of C, who advances him £500. Afterwards, at the request of B, C writes to X saying that the advance was "a gift absolutely". This discharges the note, and C's executors cannot enforce it.³⁵

The section uses exclusively "renounce" and "renunciation": its sidenote supplies waiver as a synonymous term with renunciation. The doctrine of waiver or abandonment of a right has a wide application in law and equity, and is a difficult and elusive subject; in particular, how far consideration is necessary to support waiver. Consideration is certainly not necessary when the party who claims the benefit of a waiver changed his position because of it or acted upon it. Here waiver is almost indistinguishable from estoppel.

"It is a general rule of law that a simple contract may 'before breach' be waived or discharged without a deed, and without consideration; but after breach there can be no discharge, except by deed, or upon sufficient consideration. To this rule it has been repeatedly held (cf. *per curiam*, *Foster v. Daxber* (1851), 6 Ex. at p. 851) that contracts on bills of exchange form an exception, and that the liability of the acceptor or other party, remote or immediate, though complete, may be discharged by an express renunciation of his claim on the part of the holder, without consideration. This exception seems at first sight to violate a fundamental rule, but the reason may be that the distinction between a release under seal and a release not under seal is quite unknown in most foreign countries. An express and complete renunciation by the holder of his claim on any party to the bill is therefore, according to the law merchant, equivalent to a release under seal. And as it would be highly inconvenient to introduce nice distinctions and nice questions of international law, all the contracts on a foreign bill, though negotiated

³¹ *Rothier*, Nos. 182, 183; *Nouguier*, §§ 1048, 1049; cf. *De la Torre v. Barclay* (1814), 1 Stark. 7.

³² *Abrey v. Cruas* (1869), L. R. 5 Q. C. 87.

³³ *Re George, Francis v. Bruce* (1890), 44 Ch. D. 627; cf. *Smith v. Gordon* (1888), 1 C. & E. 105 (before the Act).

³⁴ *Edwards v. Walters*, [1896] 2 Ch. 157, Q. A. *Aliter* probably if X had been an executor, not a devisee.

³⁵ *Re Dickinson*, (1909), 101 L. T. 27.

or made in England, and all the contracts on an inland bill, depending as they do on the same law merchant, may be so released. And such relaxation of the general rule in the case of bills of exchange is not unreasonable on another ground. The money due at the maturity of a bill of exchange is in practice expected to be paid immediately, and in many cases with remedies over in favour of the debtor. Parties liable, who are expressly told that recourse will not in any event be had to them, are almost sure, in consequence, to alter their conduct and decisions." " Since s. 62 does not expressly state that waiver or renunciation must be supported by consideration, the law merchant will apply; it might further be argued that the section dispenses with consideration by not expressly requiring it; renunciation is not renunciation supported by consideration.

The words requiring the renunciation to be in writing were added in committee. They alter the English law, but bring it into accordance with Scottish law. At common law a contract cannot be discharged by accord without satisfaction. The special rule as to bills and notes partially reproduced in this section seems to have been consciously imported into the law merchant from French law." This mode of discharge is known in France as "*remise volontaire*", and is recognised in countries where the civil law is followed: see *Nouguier*, §§ 1948—1052.

Cancellation.

63. (1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged.³⁶

ILLUSTRATIONS

1. The holder of a bill strikes out the acceptor's signature, intending to cancel it. This is a waiver of the acceptance, and discharges the bill.³⁷ *Aliter* if the cancellation be not apparent, and the bill be negotiated to a holder for value before maturity.³⁸

2. B accepts the first part of a foreign bill drawn in a set of two, and sends it, as directed, to a bank to be held at the disposition of the holder of the second. The drawer, who is the holder of the second part, failing to discount it, cancels it,

³⁶ *Byles on Bills*, 18th ed., at pp. 288-4.

³⁷ See *per Parke, B.*, in *Foster v. Dawber* (1851), 6 Exch. at p. 852; 155 E. R.

³⁸ Cf. *New York Negotiable Instruments Law*, §§ 200, 201.

³⁹ Cf. *Sweeting v. Halse* (1829), 9 B. & C. at p. 589; 109 E. R.; *Yglesias v. River Plate Bank* (1877), 8 C. P. D. 60.

⁴⁰ *Ingham v. Primrose* (1859), 7 C. B. (n.s.) 62; 141 E. R.; and pp. 98, 202.

and directs the bank to deliver up the first to B. B. gets the first part, and cancels his acceptance. B is discharged, and if the drawer subsequently issue a fresh second part, the holder cannot sue B.⁴¹

8. An agent is employed to collect a dishonoured bill. The acceptor offers to pay the amount without charges. The agent sends on this offer to his principal, but allows the bill to be cancelled before the offer is accepted. The principal refuses to agree to the offer. The agent is liable for any loss consequent on the unauthorised cancellation.⁴²

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.⁴³

Alteration of bill.

64. (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided,⁴⁴ except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers.⁴⁵

Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course,⁴⁶ such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.⁴⁷

⁴¹ *Ralli v. Dennistoun* (1851), 6 Exch. 488; 155 E. R.

⁴² *Bank of Scotland v. Dominion Bank*, [1891] A. C. 592, H. L.

⁴³ *Raper v. Birkbeck* (1812), 15 East 17; 104 E. R. (acceptance cancelled by referee in case of need); *Wilkinson v. Johnson* (1824), 3 B. & C. 428; 107 E. R. (indorsements cancelled by payor for honour); *Novelli v. Rossi* (1881), 2 B. & Ad. 757 (acceptance cancelled by bank where payable); approved *Castricus v. Imrie* (1870), L. R. 4 H. L. 485; *Warwick v. Rogers* (1848), 5 M. & Gr. 840 and 878; 134 E. R. (acceptance cancelled by bank where payable); *Prince v. Oriental Bank* (1878), 3 App. Cas. 825, P. C. (note cancelled by maker's banker). And so, too, in Scotland, *Dominion Bank v. Anderson* (1886), 15 Rottle 408; cf. New York Negotiable Instruments Law, § 204.

⁴⁴ *Master v. Miller* (1793), 1 Smith L. C., 13th ed., p. 780, and notes; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

⁴⁵ *Hamelin v. Bruck* (1846), 9 Q. B. 806; 115 E. R.; cf. *Langton v. Lazarus* (1889), 5 M. & W. 629; 151 E. R.

⁴⁶ See "holder in due course" defined by s. 29.

⁴⁷ New York Negotiable Instruments Law, § 205.

ILLUSTRATIONS

1. A bill is accepted for £500. The stamp is sufficient to cover £4,000. After acceptance the drawer fraudulently alters the amount to £3,500, and the bill gets into the hands of a holder in due course. He can recover £500.⁴⁸

2. A cheque for five dollars is taken by the drawer to his bankers in Canada, and certified by them. It is afterwards fraudulently altered by the drawer to a cheque for 500 dollars, thereby largely overdrawing his account, and negotiated to a holder in due course. The cheque is presented and paid. Next day the fraud is discovered, and the bank give notice to the holder. The paying bank can recover the 405 dollars from the holder.⁴⁹

3. A cheque for £10 on a trust account is signed by three executors, a space being left to the left of the words and figures. One of the executors fraudulently alters the amount to £110, and gets the money. The bank cannot charge the trust account with the £110.⁵⁰ *Sed qu*; the negligence of the trustees seems to bring the case clearly within *MacMillan's Case*, *infra*.

4. A partner in a firm draws a cheque, not filling in the amount in words, but putting £2 0 0 in the space for figures. A confidential clerk misappropriates the cheque, writes "one hundred and twenty pounds" in the space for words, and alters the "2" into 120. If the bank pays this cheque it can debit the firm's account with £120.⁵¹

A document purporting to be a bill, but which bears neither date nor drawer's name, is "accepted". The word "London" is lithographed on it as the place of origin. Being an unstamped paper it would have been void in any case as an inland bill. L. at Lausanne substitutes "Lausanne" for "London", and signs as drawer. The paper becomes a good foreign bill and the case is not one of alteration of an existing bill.⁵²

The proviso was introduced in committee to mitigate the rigour of the common law rule in favour of a holder in due course. The proviso is not retrospective, and does not apply to Bank of England notes.⁵³ At common law a material alteration, by whomsoever made,⁵⁴ avoided and discharged the bill, except as against a party who made or assented to the alteration.⁵⁵ Thus where a bill was altered by adding a place of payment without the acceptor's consent, and was subsequently indorsed to a holder in due course, it was laid down that the holder could not sue the indorser on the bill, for the instrument was discharged.⁵⁶ He could only sue on the consideration. In America the rule was not quite so severe, and it was held that

⁴⁸ *Scholfield v. Lonsborough*, [1895] 1 Q. B. 586, C. A.; affirmed [1896] A. C. 514, H. L.

⁴⁹ *Imperial Bank of Canada v. Bank of Hamilton*, [1908] A. C. 49, P. C.

⁵⁰ *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559, P. C.; criticised and not followed, *London Joint Stock Bank v. MacMillan*, [1918] A. C. 777, H. L.

⁵¹ *London Joint Stock Bank v. MacMillan*, [1918] A. C. 777, H. L., overruling Courts below.

⁵² *Foster v. Driscoll*, [1929] 1 K. B. 470. See further, Scrutton, L.J.'s explanation of this case in *Koch v. Dicks*, [1938] 1 K. B. 307.

⁵³ *Leeds Bank v. Walker* (1883), 11 Q. R. D. 84.

⁵⁴ See *Davidson v. Cooper* (1843), 11 M. & W. at p. 799; 152 E. R.; affirmed 18 M. & W. 343; 153 E. R. (alteration by stranger). It is the duty of the holder to preserve the instrument intact.

⁵⁵ *Hamelin v. Bruck* (1846), 9 Q. B. 306; 115 E. R.

⁵⁶ *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

an alteration by a stranger, or, as it is called, "an act of spoliation", did not avoid a bill.⁵⁷ An alteration is "apparent" when it is such as would be noticed by an intending holder who scrutinises the document with reasonable care.⁵⁸ It is for the holder to show that an alteration is not apparent.⁵⁹ The section does not apply in the case of accidental damage.⁶⁰

Effect of stamp laws.—By s. 97 (8), the effect of the stamp laws is expressly preserved, and this saving appears to cut down considerably the effect of the proviso. Therefore, when any question of alteration arises, two points have to be considered, viz. : (1) does the alteration avoid the bill under the Act ? (2) if not, does it avoid the bill under the stamp laws by making it a new instrument requiring a fresh stamp ? As regard the stamp laws it is to be noted : (a) that a bill may be altered at any time before issue,⁶¹ and for this purpose "issue" means the first delivery of a bill to a person who takes it as a holder *for value*, so as to be able to enforce payment thereof⁶²; (b) that a bill may be altered for the purpose of correcting a mistake⁶³ and bringing the instrument into accordance with the intention of the parties at the time of issue⁶⁴; (c) that in any case where an adhesive stamp may be used⁶⁵ the bill may be re-stamped, and that the alteration abroad of a bill issued abroad does not affect it for stamp purposes in England. Subject to these qualifications, a material alteration after issue renders the bill a new instrument requiring a fresh stamp.⁶⁶ The Courts may well look with less favour on stamp objections now than formerly, and possibly some of the older cases may be open to reconsideration.

⁵⁷ *Parsons on Bills*, vol. II, p. 574; cf. *U. S. v. Spalding* (1822), 2 Mason, at p. 482, *per* Story, J.; *Dunsmore v. Duncan* (1874), 57 New York R. at p. 581.

⁵⁸ *Woollatt v. Stanley* (1928), 188 L. T. 620, differing on this point from *Leeds Bank v. Walker* (1888), 11 Q. B. D. 84.

⁵⁹ *Ibid.*

⁶⁰ *Hong-Kong and Shanghai Banking Corporation v. Lo Lee Shu* (1928), A. C. 181 (bank-note accidentally mutilated in laundering a garment and partially restored, but number missing: claim against bank held established by production of fragments and oral evidence).

⁶¹ *Webber v. Maddocks* (1811), 3 Camp 1; 170 E. R.; *Kennerly v. Nash* (1816), 1 Stark. 452; *Downes v. Richardson* (1822), 5 B. & Ald. 674; 106 E. R.; *Sherrington v. Jermyn* (1828), 3 C. & P. 974; 172 E. R.; *Wright v. Inshaw* (1842), 1 D. (N.S.) 802.

⁶² *Cardwell v. Martin* (1808), 9 East 190; 108 E. R.; *Downes v. Richardson* (1822), 5 B. & Ald. 674; 106 E. R.; *Ex p. Bignold* (1886), 1 Deac. at p. 785; *Scholfield v. Earl of Lonsborough*, [1894] 2 Q. B. 660.

⁶³ Cf. *Ex p. White* (1838), 2 Deac. & Ch. at pp. 358, 359; *Hamein v. Bruch* (1846), 9 Q. B. at p. 810; 115 E. R.; *London and Prov. Bank v. Roberts* (1874), 22 W. R. 402.

⁶⁴ *Brutt v. Picard* (1824), R. & M. 87; 171 E. R. (date); *Bradley v. Bardsley* (1845), 14 M. & W. 878; 158 E. R.; *Byron v. Thompson* (1889), 11 A. & W. 81; 118 E. R.; *Caries v. Tattersall* (1841), 2 M. & Gr. 890; 138 E. R.

⁶⁵ Stamp Act, 1891, s. 84, p. 349.

⁶⁶ *Knill v. Williams* (1809), 10 East 481; 108 E. R.; cf. *Suffell v. Bank of England* (1882), 9 Q. B. D. at p. 574, *per* Cotton, L.J.

What alterations are material.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.⁶⁷

ILLUSTRATIONS

1. The following are material:—

A particular consideration is substituted for the words "value received"⁶⁸; or the date of a bill payable at a fixed period after date is altered, and the time of payment thereby postponed⁶⁹ or accelerated⁷⁰; or a bill payable three months after date is converted into a bill payable three months after sight⁷¹; or the date of a cheque or bill payable on demand is altered⁷²; or the crossing of a cheque is altered⁷³; or the sum payable is altered, e.g., from £105 to £100⁷⁴; or the specified rate of interest is altered, e.g., from 3 per cent. to 2½ per cent.⁷⁵; or a bill payable "with lawful interest" is altered by adding the words "interest at six per cent."⁷⁶; or a particular rate of exchange is indorsed on a bill which does not authorise this to be done⁷⁷; or a joint note is converted into a joint and several note⁷⁸; or a new maker is added to a joint and several note⁷⁹; or the name of a maker of a joint and several note is cut off⁸⁰; or intentionally erased⁸¹; or the place of payment is altered, e.g., a bill is accepted payable at X & Co.'s, and Y & Co. is substituted for X & Co.⁸²; or a place for payment is added *without* the acceptor's consent⁸³; or the number on a Bank of England note is altered⁸⁴; or the words "pai —

⁶⁷ Cf. New York Negotiable Instruments Law, § 206.

⁶⁸ *Knill v. Williams* (1809), 10 East 431; 103 E. R.; cf. *Wright v. Inshaw* (1842), 1 D. (N.S.) 809.

⁶⁹ *Outhwaite v. Luntley* (1815), 4 Camp. 179; 171 E. R.; *Hirschman v. Budd* (1878), L. R. 8 Ex. 171; *Société Générale v. Metropolitan Bank* (1878), 21 W. R. 385; *Woodlatt v. Stanley* (1928), 138 L. T. 620.

⁷⁰ *Master v. Miller* (1798), 1 Smith L. C., 18th ed., p. 780; *Walton v. Hastings* (1815), 4 Camp. 228; 171 E. R. (stamp).

⁷¹ *Long v. Moore* (1790), 3 Esp. 155, n.; 170 E. R.

⁷² *Vance v. Louther* (1876), 1 Ex. D. 176.

⁷³ See s. 78, overriding *Simmonds v. Taylor* (1856), 27 L. J. C. P. 248.

⁷⁴ Cf. *Hamelin v. Bruck* (1846), 9 Q. B. 806; 115 E. R.

⁷⁵ *Sutton v. Toomer* (1827), 7 B. & C. 416; 108 E. R.

⁷⁶ *Warrington v. Early* (1858), 28 L. J. Q. B. 47.

⁷⁷ *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340.

⁷⁸ *Perring v. Home* (1828), 4 Bing. 28; 130 E. R.

⁷⁹ *Gardner v. Walsh* (1856), 5 E. & B. 83; 119 E. R.; cf. *Clerk v. Blackstock* (1816), Holt N. P. 474; 171 E. R.

⁸⁰ Cf. *Mason v. Bradley* (1843), 11 M. & W. 590; 152 E. R.; *Benedict v. Cowden* (1873), 49 New York R. 396 (cutting off condition written at bottom of note).

⁸¹ *Nicholson v. Revell* (1836), 4 A. & E. 675; 111 E. R.

⁸² *Tidmarsh v. Grover* (1813), 1 M. & S. 786; 105 E. R.

⁸³ *Calvert v. Baker* (1886), 4 M. & W. 417; 130 E. R.; *Burchfield v. Moors* (1854), 23 L. J. Q. B. 261; cf. *Hambury v. Lovett* (1868), 18 L. T. 888. *Qu.* if the acceptor consent: *Waller v. Cubley* (1838), 2 Cr. & M. 151; 149 E. R.; and cf. *Mason v. Bradley* (1843), 11 M. & W. at p. 594; 152 E. R.; but see *Gibb v. Mather* (1859), 2 Cr. & J. at p. 262; 149 E. R.; *Saul v. Jones* (1868), 28 L. J. Q. B. 37, which show that the position of the drawer and indorsers is altered.

⁸⁴ *Suffell v. Bank of England* (1882), 9 Q. B. D. 555, C. A.; *Leeds Bank v. Walker* (1885), 11 Q. B. D. 84.

and —" are added to payee's name on the face of a cheque⁸⁵, or where the place of drawing was altered from London to Deussingen, thus changing the bill from an inland bill to a foreign one.⁸⁶

2. The following are immaterial:—

A bill payable to C or bearer is converted into a bill payable to C or order⁸⁷; or an indorsement in blank is converted into a special indorsement⁸⁸; or the words "on demand" are added to a note in which no time of payment is expressed⁸⁹; or a bill addressed to Brown & Co., under the style of Brown, Smith & Co., is accepted by them as Brown & Co., and the address is afterwards altered to make it correspond with the acceptance⁹⁰; or an erroneous due date is added to a bill⁹¹; or the words "or order" are struck out by the acceptor in the case of a bill payable to "D or order"⁹²; or the number on a bank-note (not issued by the Bank of England) is missing⁹³, and where the name of the addressee (inserted wrongly by the holder) was altered to that of the defendant whose signature formed the acceptance of the bill.⁹⁴

An alteration is material which in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial⁹⁵; and it may be that even this test is not wide enough. "Any alteration", says Brett, L.J., "seems to me material which would alter the business effect of the instrument, if used for any business purpose."⁹⁶ The materiality of an alteration is a question of law.⁹⁷

Subject to two exceptions, the holder of a bill which has been avoided by a material alteration cannot sue on the consideration in respect of which it was negotiated to him.⁹⁸

Exception 1.—If the bill was negotiated to him after the alteration was made, and he was not privy to the alteration, he may sue on the consideration.⁹⁹

⁸⁵ *Slingsby v. Westminster Bank* (No. 2), [1931] 2 K. B. 569; *Same v. District Bank* (1931), 47 T. L. R. 567.

⁸⁶ *Koch v. Dicks*, [1933] 1 K. B. 307.

⁸⁷ *Attwood v. Griffin* (1826), 2 C. & P. 366; 172 E. R.

⁸⁸ See s. 34 (4).

⁸⁹ *Aldous v. Cornwell* (1868), L. R. 3 Q. B. 578; see s. 10.

⁹⁰ *Farquhar v. Southey* (1826), M. & M. 14; 178 E. R.; but see *Bank of Montreal v. Bahbit and Trading Co.* (1908), 11 Com. Cas. 250, as to adding the word "Limited" to the name of an unincorporated company.

⁹¹ *Fanshawe v. Peet* (1857), 26 L. J. Ex. 314.

⁹² *Decroix v. Meyer* (1890), 25 Q. B. D. 343, C. A.

⁹³ *Hong-Kong and Shanghai Banking Corporation v. Lo Lee Shi* (1928), 97 L. J. P. C. 35.

⁹⁴ *Haseldine v. Winstanley*, [1936] 2 K. B. 101, where Horridge, J., held that s. 20 (1) applied; but there was in reality no completed bill at the time of the alteration and the instrument could have been treated as a note, and was so treated by Horridge, J., in his alternative reason for finding for the plaintiff: cf. *Foster v. Driscoll and Koch v. Dicks*, *supra*.

⁹⁵ *Gardner v. Walsh* (1855), 5 E. & B. 88, at p. 89; 119 E. R. Cf. *per* Scrutton, L.J., in *Koch v. Dicks*, *supra*.

⁹⁶ *Suffell v. Bank of England* (1892), 9 Q. B. D. 555, at p. 568; see the test suggested by Cotton, L.J., at pp. 574, 575. Cf. Scrutton, L.J., in *Koch v. Dicks*, *supra*.

⁹⁷ *Vance v. Lowther* (1876), 1 Ex. D. 176; *Peizer v. Lefkowitz*, [1912] 2 K. B. at p. 243.

⁹⁸ *Alderson v. Langdale* (1892), 3 B. & Ad. 660; 106 E. R.

⁹⁹ *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; cf. *Cundy v. Marriott* (1831), 1 B. & Ad. 696; 106 E. R.

Exception 2.—If the bill was altered while in his custody or under his control, he can still recover, provided (a) that he did not intend to commit a fraud by the alteration,¹ and (b) that the party sued would not have had any remedy over on the bill if it had not been altered. For example :—

1. A sells goods to B, and draws a bill on him for the price, payable to his own order. B accepts. The bill is subsequently altered while in A's possession. A can sue B for the price of the goods, though no action could be brought on the bill.²

2. C sells goods to A. A, to pay for the goods, indorses to C a bill which he has drawn on and which has been accepted by a third person. The bill is altered while in C's hands. C cannot sue A for the price of the goods, for the alteration has deprived A of his remedy on the bill against the acceptor.³

3. Note given for an agreed debt. The payee innocently alters it by adding a stipulation for interest. He can recover in an action on the consideration, though he cannot recover on the note.⁴

Where a bill appears to have been altered, or there are marks of erasure on it, the party seeking to enforce the instrument is bound to give evidence to show that it is not avoided thereby.⁵ Cf. s. 68 (8).

Discharge of Surety by Dealings with Principal

Principal and surety.—Where a relationship in the nature of principal and surety exists between the parties to a bill, or the parties to a bill transaction, and the holder having notice thereof enters into a binding agreement with the principal to give time to him, or, of his own act, discharges the principal, the surety or sureties are thereby discharged,⁶ unless the holder, in so doing, expressly reserves his rights against the surety or sureties, thereby preserving the remedy over.⁷

For the present purpose the acceptor of a bill is *prima facie* the principal debtor, and the drawer and indorsers are, as regards him, sureties, and the drawer of a bill is the principal as regards the

¹ Parsons, vol. ii, p. 572; *Hunt v. Gray* (1871), 10 Amer. R. 232.

² *Atkinson v. Hawdon* (1885), 2 A. & E. 628; cf. *Sutton v. Toomer* (1827), 7 B. & C. 416; 108 E. R. (payee against maker of note).

³ *Alderson v. Langdale* (1882), 3 B. & Ad. 660; see by way of analogy the effect at common law of the loss of a bill, *Crowe v. Clay* (1854), 9 Exch. 604; 156 E. R.

⁴ *Payana Reena v. Pana Lanu*, [1914] A. C. 618, F. C.

⁵ *Knight v. Clements* (1888), 8 A. & E. 216; 112 E. R.; *Clifford v. Parker* (1841), 2 M. & Gr. 909; 138 E. R.; *Woollatt v. Stanley* (1928), 198 L. T. 620; cf. *Tatum v. Catomore* (1851), 16 Q. B. at p. 746; see, e.g., *Cariss v. Tattersall* (1841), 2 M. & Gr. 890; 138 E. R., as to what evidence suffices.

⁶ *Oriental Corporation v. Overend* (1871), L. R. 7 Ch. 142; affirmed (1874), L. R. 7 H. L. 848; cf. Netherlands Code, Arts. 198, 199; *aliter* after judgment obtained against both principal and surety, *Re A Debtor*, [1919] 3 K. B. 11; cf. *Provincial Bank of Ireland v. Fisher*, [1919] Ir. R. 249, H. L. (time given to principal, onus of proving surety's assent); and see, generally, Rowlatt's *Principal and Surety*, 2nd ed.

⁷ *Owen v. Homan* (1858), 4 H. L. Cas. 997; 10 E. R.; *Muir v. Crawford* (1875), L. R. 2 Sc. App. 466, H. L.; *Jones v. Whitaker*, [1887] W. N. p. 192, C. A.; *New York Negotiable Instruments Law*, § 201 (6).

indorsers, and the first indorser is the principal as regards the second and subsequent indorsers, and so on in order⁸; but evidence for the present purpose is admissible to show the real relationship of the parties, and it is immaterial that the holder was ignorant of the relationship when he took the bill, provided he had notice thereof at the time of his dealings with the principal.⁹ For example:—

1. The holder of a bill takes from the acceptor in lieu of payment a new bill payable at a future day, to which the drawer and indorsers are not parties. This discharges the drawer and indorsers.¹⁰

2. The holder of a bill for £200 takes from the acceptor £100 in full discharge of his claim, but expressly reserves his rights against the drawer and indorsers (thereby preserving their rights against the acceptor). The drawer and indorsers are not discharged.¹¹

3. The holder of a bill for £100 accepts a composition of 10s. in the pound from the acceptor under Bankruptcy Act, 1869, ss. 125, 128. The drawer and indorsers are only discharged to the extent of the sum received by the holder, for the acceptor is discharged by operation of law.¹²

4. The holder of a dishonoured bill enters into a binding agreement to give time to the first indorser. This discharges the subsequent indorsers, but not the drawer or acceptor.¹³

5. The holder of a bill at the request of the acceptor delays presenting it for payment. The drawer is discharged.¹⁴

6. A bill is accepted by six joint acceptors. Three accept as sureties for the other three, who accept for the accommodation of the first indorser. The holder, knowing the facts, makes an arrangement with the first indorser. The acceptors are discharged.¹⁵

7. A bill is accepted for the accommodation of the drawer and C the indorser. The holder agrees to give time to C. The acceptor is discharged.¹⁶

8. C is the holder of a joint and several note made by B and X. X signed merely to accommodate B, and as surety for him. C, knowing this, agrees for consideration to give time to B. X is thereby discharged.¹⁷

9. C is the holder of a joint and several note made by B and X. C knows that X signed as surety to accommodate B. B pays C. It turns out afterwards that this payment was a fraudulent preference. C refunds the money to B's trustees. X is not discharged by B's payment.¹⁸

10. A bill is accepted for the accommodation of the drawer. After it is due the holder is informed of this and then agrees to give time to the drawer. The acceptor is discharged.¹⁹

11. A bill drawn by A and accepted by B is discounted with C. C subsequently discovers that the bill was drawn and accepted for the accommodation of X, who

⁸ Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, *per* Willes, J.

⁹ *Ewin v. Lancaster* (1865), 6 B. & S. at p. 577; 122 E. R.; *Oriental Corp. v. Overend* (1871), L. R. 7 Ch. 142; affirmed (1874), L. R. 7 H. L. 848.

¹⁰ Cf. *Gould v. Robson* (1807), 8 East 576; 108 E. R., and *Petty v. Cooke* (1871), L. R. 6 Q. B. at p. 794.

¹¹ *Muir v. Crawford* (1875), L. R. 2 Sc. App. 456, H. L.; *Jones v. Whitaker*, [1887] W. N. 132, C. A.

¹² *Re Jacobs* (1876), L. R. 10 Ch. 211; cf. *Provincial Bank of Ireland v. Dunne* (1878), Ir. L. R. 2 Q. B. 21; *Yglesias v. River Plate Bank* (1877), 3 C. P. D. 60. But as to a voluntary composition, see *Mayhew v. Boyes* (1910), 110 L. T. 1, C. A.

¹³ *Claridge v. Dalton* (1815), 4 M. & B. at p. 292; 105 E. R.; *Hall v. Cole* (1836), 4 A. & E. 577; 111 E. R.

¹⁴ *Latham v. Chartered Bank of India* (1874), L. R. 17 Eq. 205.

¹⁵ *Ex p. Webster* (1847), De Gex 414.

¹⁶ *Bulley v. Edwards* (1864), 4 B. & S. 781; 122 E. R.

¹⁷ *Greenough v. M'Clelland* (1860), 30 L. J. Q. B. 15, Ex. Ch.

¹⁸ *Petty v. Cooke* (1871), L. R. 6 Q. B. 790.

¹⁹ *Ewin v. Lancaster* (1865), 6 B. & S. 571; 122 E. R.; cf. *Torrance v. Bank of British North America* (1873), L. R. 5 P. C. at p. 252.

is not a party to the bill, but who is to provide for it. C then enters into an agreement to give time to X. This discharges the acceptor of the bill.²⁰

12. A note is made by a limited company and is indorsed by three directors in succession. It appears that they all agreed to indorse the note to guarantee the company's debt. They are liable *inter se* as co-sureties, and not in succession according to the order of their indorsements.²¹

13. Bill indorsed by a firm before dissolution of partnership but dishonoured after. The indorsee gives time to the continuing partner. The retiring partner is discharged.²²

Who are Principal and Surety

Formerly it was held at law that where a party's name appeared on a bill as principal, *e.g.*, as acceptor, he could not be shown to be a surety, for that was a contradiction of the written instrument.²³ This doctrine was afterwards modified in cases where it could be shown there was a contemporaneous agreement that he should be treated as a surety,²⁴ and now it is clearly established that the rights of the surety arise independently of the form of the instrument. For the purpose of enforcing the debt the principal debtor on the instrument may be treated as such²⁵; but, apart from this, as soon as the creditor is affected with notice that the apparent principal was and is only a surety, the ordinary consequences which flow from that relationship ensue, and the creditor disregards them at his peril. Any such dealing with the real principal or other sureties as would ordinarily discharge a surety discharges the party liable on the bill.²⁶ And where a principal debtor, by subsequent arrangement with his co-principal, becomes only a surety, he thereby acquires the rights of a surety as against all parties with notice of the change.²⁷

As to the circumstances under which a surety is discharged there is nothing peculiar to bills or bill transactions, and the reader is referred to the standard works on Suretyship and Guarantee. But the following salient points may be noted.

Giving time.—Though a binding agreement to give time to the principal discharges the surety, whether he be injured thereby or not,²⁸ mere delay in suing the principal or pressing him for payment does not discharge the surety. "I am far from saying", says Tindal,

²⁰ *Oriental Corporation v. Overend* (1871), L. R. 7 Ch. 142; affirmed (1874), L. R. 7 H. L. 348.

²¹ *Macdonald v. Whitfield* (1888), 8 App. Cas. 789, P. C.; as to admissibility of parol evidence to explain the transaction, see at p. 748, and cf. *National Sales Corporation v. Bernardi* (1931), 47 T. L. R. 380.

²² *Goldfarb v. Bartlett*, [1920] 1 K. B. 639.

²³ *Fentum v. Pocock* (1818), 5 Taunt. 192; 128 E. R.

²⁴ *Manley v. Boycott* (1853), 2 B. & B. 48; 118 E. R.

²⁵ Cf. *Batson v. King* (1859), 28 L. J. Ex. 327, at p. 328.

²⁶ *Greenough v. M'Clelland* (1860), 30 L. J. Q. B. 16; *Oriental Corporation v. Overend* (1874), L. R. 7 H. L. 348, see at p. 360.

²⁷ *Rouse v. Bradford Banking Co.*, [1894] A. C. 586, 591, overruling *Swire v. Redman* (1876), 1 Q. B. D. 586.

²⁸ *Polak v. Everett* (1876), 1 Q. B. D. 660, at p. 673, C. A.

C.J., "that there may not be an extreme case of laches amounting to fraud, and fraud would be a defence to the action, but not mere negligence."²⁹

The agreement to give time must be a binding agreement and founded on consideration. Where the executrix of the acceptor of a bill orally promised to pay the holder out of her own estate if he would forbear to sue, and paid him interest for so forbearing, it was held that, as the promise was unenforceable (not being in writing as required by statute), the drawer was not discharged by the delay.³⁰

Again, the agreement to give time must be made with the principal debtor, and not with a third party. Thus, when the indorsee of a bill sued the drawer, it was held to be no defence that the indorsee, without the drawer's consent, had agreed with X, not a party to the bill, to give time to the acceptor in consideration of X's promise to see the bill paid.³¹

Although mere delay in pressing the principal does not discharge the surety, yet it may do so if it be in contravention of the original contract. Thus, the defendant signed a joint and several note on demand as surety for the other maker, on the terms that the payee should demand payment of the note from the other maker within three years. The payee did not demand payment within three years, and the other maker became insolvent. *Held*, that the defendant was discharged.³² So, too, in the ordinary case when the acceptor of a bill is the principal debtor, the drawer and indorsers are discharged if it be not presented for payment on its due date, for such presentment is part of the original contract.

If in giving time to the principal the creditor expressly reserves his rights against the surety, the latter is not discharged. Lord Hatherley has given us the reason for this qualification of the rule.³³

Discharge of principal.—Unless the creditor reserves his rights against the surety it is clear that discharging the principal must discharge the surety, for the accessory obligation falls with the main obligation. Thus, if the holder of a bill agrees to accept a composition from the acceptor, the drawer will be discharged, unless it be a composition or scheme under the Bankruptcy Act, when the discharge is regarded as being effected by operation of law.³⁴

²⁹ *Goring v. Edmonds* (1829), 6 Bing. 94, at p. 99; 180 E. R. See, too, *Bell v. Banks* (1841), 8 M. & Gr. 258; 133 E. R.; *Black v. Ottoman Bank* (1862), 15 Moore P. C. 478, at p. 484; 15 E. R.; *Carter v. White* (1868), 25 Ch. D. 666, at p. 672, C. A. So, too, in Scotland, *Hay and Kyd v. Pourie* (1886), 18 Rottie 777.

³⁰ *Philpot v. Briant* (1828), 4 Bing. 717; 130 E. R.; cf. *Petty v. Cooke* (1871), L. R. 6 Q. B. 790.

³¹ *Fraser v. Jordan* (1857), 26 L. J. Q. B. 288.

³² *Lawrence v. Walmsley* (1862), 31 L. J. C. P. 143.

³³ *Oriental Corporation v. Overend* (1871), L. R. 7 Ch. App. at p. 150.

³⁴ *Megrath v. Gray* (1874), L. R. 9 C. P. 216; *Re Jacobs* (1875), L. R. 10 Ch. App. 208, at p. 214.

Co-sureties.—Where two or more sureties contract severally, the creditor, by releasing one, does not discharge the others; but “when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each.”³⁵

Right to securities.—“A surety”, says the Privy Council, “is entitled to the benefit of all securities in the hands of the creditor whether, when he became a surety, he knew of them or not. Thus, in *Pearl v. Deacon*, where the plaintiff was surety in a promissory note for a sum lent by the defendants to their tenant, and a mortgage was subsequently taken by the defendants on the tenant’s furniture for the same debt, they afterwards, under a distress, took the same furniture for arrears of rent, it was held that, inasmuch as the produce of the furniture was first applicable to the payment of the note, the landlord could not, as against the surety, apply it to the payment of the rent, and that the surety was discharged not, it is to be observed, absolutely, but *pro tanto*. It has been held in other cases that when a creditor wastes or improperly deals with a security, the surety is released *pro tanto*.”³⁶ It was formerly thought that the creditor was entitled to the benefit of collateral securities given by the debtor to the surety, but this is not so.³⁷

Where a bill or note is part of the machinery for creating an ordinary contract of suretyship, the doctrine of the surety’s right to securities applies in its entirety; but in the course of an ordinary bill the drawer and indorsers are not strictly sureties, but are in the nature of sureties for the acceptor, and their equity to securities held for the bill only attaches when the bill is dishonoured. “This equity”, says Lord Selborne, “will not incapacitate bankers who hold a bill, accepted by their customer and indorsed by a third party, from carrying on their dealings with that customer by varying the securities received from him according to the ordinary course of those dealings, as long as he remains solvent, and before the acceptance has been dishonoured. But it is an equity which does attach when the bills, overdue and dishonoured, and the securities are found together in the hands of the secured creditor at the time when he requires payment from the indorser; when the creditor has then no other transactions depending with the customer, and no claim upon the securities except for the bills themselves.”³⁸

³⁵ *Ward v. National Bank of New Zealand* (1889), 8 App. Cas. 755, at p. 764.

³⁶ *Ward v. National Bank of New Zealand* (1889), 8 App. Cas. 755, at p. 765, citing *Pearl v. Deacon* (1857), 26 L. J. Ch. 761. As to waste of security, see *Wulf v. Jay* (1872), L. R. 7 Q. B. 756; *Rainbow v. Juggins* (1880), 5 Q. B. D. 422.

³⁷ *Re Walker*, [1892] 1 Ch. 621.

³⁸ *Duncan v. N. & S. Wales Bank* (1890), 6 App. Cas. 1, at p. 18, reversing *S. C.*, 11 Ch. D. 88, *C. A.*: *Aga Ahmed v. Judith Crisp* (1891), 19 Ind. App. 24, P. C. (indorser of note).

The machinery of a bill transaction will not be allowed to defeat the rules in bankruptcy as to valuation of securities. Thus, the acceptor deposited certain wool with the drawer to secure payment. The drawer indorsed the bill and the acceptor then became bankrupt. The indorsee, by arrangement with the drawer, proved for the full amount of the bill. The drawer claimed to retain the security for the difference between the dividend and the amount of the bill, but it was held he could not do so.⁴⁰

Severable contracts.—A contract of suretyship may be severable. Thus, where a surety guaranteed payments for goods, to be delivered by instalments, and the creditor took the debtor's promissory note for one instalment, it was held that the surety was only released as to that instalment.⁴¹

In a case in 1866 it was held that, where the debtor obtained two loans from a money club, the surety on the first note could not claim that all moneys subsequently paid in by the debtor should be credited to the first note.⁴¹

Renewal

Effect of renewal.—When a bill is given in renewal of a former bill, and the holder retains such former bill, the renewal, in the absence of special agreement,⁴² operates merely as a conditional payment thereof. If the renewal bill be paid in due course or otherwise discharged, the original bill is likewise discharged⁴³; but if the renewal bill be dishonoured, then, subject to the preceding rule as to principal and surety, the liabilities of the parties to the original bill revive, and they may be sued thereon.⁴⁴

Renewal.—Renewing a bill or note operates as an extension of the time for paying it.⁴⁵ Hence, if a bill be renewed without the assent of

³⁹ *Barnes v. Wright* (1885), 16 Q. B. D. 380, C. A. Compare *Ex p. European Bank* (1871), L. R. 7 Ch. App. 99, as to double proof.

⁴⁰ *Groydon Gas Co. v. Dickinson* (1876), 2 C. P. D. 46, C. A.

⁴¹ *Wright v. Hickling* (1866), L. R. 2 C. P. 199; cf. *Jones v. Gretton* (1858), 8 Exch. 778; 155 E. R. See *Re Sherry* (1884), 25 Ch. D. 692, C. A., as to appropriation of payments.

⁴² Cf. *Lewis v. Lyster* (1895), 2 C. M. & R. 704; 150 E. R.; *Lumley v. Musgrave* (1897), 4 Bing. N. C. at p. 15; 182 E. R.

⁴³ *Dillon v. Rimmer* (1822), 1 Bing. 100; 180 E. R.; cf. *Soward v. Palmer* (1818), 2 Moore 274; *Lumley v. Hudson* (1897), 4 Bing. N. C. 15; 182 E. R. In *Mascarenhas v. Mercantile Bank of India* (1931), 47 T. L. R. 611, debentures were fraudulently pledged and renewals given, and it was held that the true owner of the original debentures could not recover the renewals from an indorsee.

⁴⁴ *Ex p. Barclay* (1802), 7 Ves. jun. 597; 82 E. R.; *Norris v. Aylett* (1809), 2 Camp. 329; 170 E. R.; cf. *Kendrick v. Lomas* (1892), 2 Cr. & J. 405; 149 E. R.; *Sloman v. Cor* (1884), 1 C. M. & R. at p. 472; *Fenton v. Blackwood* (1874), L. R. 5 P. C. 187.

⁴⁵ *Jagger Iron Co. v. Walker* (1879), 76 New York R. 521. As to the construction of a guarantee for renewal, see *Harber v. Mackrell*, [1892] W. N. at p. 183; 41 W. R. 341, C. A.

all parties liable thereon as sureties, the parties so liable are discharged. When there is an agreement to renew, the application for renewal must be made within a reasonable time of the maturity of the original bill, but need not be made before its maturity.⁴⁶ When the holder of a renewed bill could not have maintained an action on the original bill because there was no consideration,⁴⁷ or the consideration was illegal,⁴⁸ or because he was privy to some fraud connected therewith,⁴⁹ he cannot sue on the renewed bill.⁵⁰ A bill given in renewal of another bill operates in the same way as a bill given in respect of any other debt. The ordinary effect of giving a bill is that the remedy for the debt is suspended until dishonour of the bill. The bill operates as conditional payment, the condition being that the debt revives if the bill cannot be realised. It is immaterial whether the bill be payable on demand or *in futuro*.⁵¹

In France, apart from special agreement, the renewal of a bill extinguishes the original bill by *novatio*.⁵²

⁴⁶ *Maillard v. Page* (1870), L. R. 5 Ex. 321; cf. *Innes v. Munro* (1847), 1 Exch. 478; 154 E. R.; *Torrance v. Bank of British North America* (1873), L. R. 5 P. C. 246, as to construction of agreements to renew.

⁴⁷ *Southall v. Rigg* (1851), 11 C. B. 481; 138 E. R.; cf. *Edwards v. Chancellor* (1888), 52 J. P. 454.

⁴⁸ *Chapman v. Blach* (1819), 2 B. & Ald. 588; 106 E. R.; *Hay v. Ayling* (1851), 18 Q. B. 423.

⁴⁹ *Lee v. Zagury* (1817), 8 Taunt. 114; 129 E. R.; distinguished in *Mascarenhas v. Mercantile Bank of India* (1931), 47 T. L. R. 611.

⁵⁰ See, however, two apparent but not real exceptions, *Mather v. Maidstone* (1856), 18 C. B. 273; 139 E. R.; *Flight v. Reed* (1869), 1 H. & C. 709; 138 E. R.

⁵¹ *Currie v. Misa* (1875), L. R. 10 Ex. at pp. 163, 164, Ex. Ch. As to requiring a bill by substituting a forged renewal, which is inoperative, see *Bell v. Buokley* (1858), 25 L. J. Ex. 163.

⁵² *Nougner*, §§ 1032—1042.

Acceptance and Payment for Honour

Acceptance for honour supra protest.

65. (1) Where a bill of exchange has been protested for dishonour by non-acceptance,⁵³ or protested for better security,⁵⁴ and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder intervene and accept the bill supra protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.⁵⁵

By s. 98, it is sufficient that the bill has been noted without the protest having been actually extended.

The Act appears to enable the drawee as well as a stranger to the bill to accept for honour.⁵⁶ The person for whose account a bill is drawn is commonly called the "third account". *Beawes*, No. 42, says that, if a bill be accepted for the honour of an indorser, there may be another acceptance for the honour of any party prior to him; but this rule is believed to be obsolete.⁵⁷ If, however, the acceptor for honour fails before the maturity of the bill, a second acceptance for honour is sometimes obtained: cf. *Story*, § 122.

In the United States, as in England, the holder may refuse to allow acceptance for honour (see *Story*, § 122), for he may wish to exercise his immediate right of recourse which arises on non-acceptance. By German Exchange Law, Arts. 56, 57, if the bill contains a reference in need, the holder must resort to the case of need, but in other cases he may refuse an acceptance for honour. In France and Holland it seems the holder cannot refuse an acceptance for honour.⁵⁸

Acceptance for honour.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3) An acceptance for honour supra protest in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance of honour:

(b) be signed by the acceptor for honour.⁵⁹

⁵³ *Mutford v. Walcot* (1898), 1 Ld. Raym. 575; 91 E. R.

⁵⁴ *Ex p. Wackerbath* (1800), 5 Ves. jun. 574; 81 E. R., and see s. 51 (5).

⁵⁵ New York Negotiable Instruments Law, § 280.

⁵⁶ Cf. *Beawes*, No. 42, and *Nouguier*, § 574.

⁵⁷ See, however, New York Negotiable Instruments Law, § 280.

⁵⁸ See French Code, Art. 126; *Nouguier*, §§ 574, 575; Netherlands Code, Arts. 122, 123.

⁵⁹ New York Negotiable Instruments Law, §§ 280, 281.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.⁶⁰

It would be sufficient if the acceptor for honour merely wrote "Accepted S. P." on the bill and signed it; but it is usual for him to state for whose honour he accepts. The practice is for an acceptance for honour to be attested by a notarial "act of honour" recording the transaction.⁶¹ A clause requiring this was inserted in the bill, but it was struck out in committee; so, perhaps, this is no longer essential.⁶² Cf. s. 68 (8) for payment for honour.

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.⁶³

This sub-section brings the law into line with mercantile understanding, and gets rid of an inconvenient ruling that maturity was to be calculated from the date of acceptance for honour.⁶⁴ For noting, see s. 51 (4).

Liability of acceptor for honour.

66. (1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.⁶⁵

By s. 98, it is sufficient if the bill has been noted for protest, although the protest has not been extended. As a reason for requiring presentment for payment to the drawee, Lord Ellenborough

⁶⁰ See German Exchange Law, Art. 59; Nougues, § 578, and Daniel, § 578, to same effect; New York Negotiable Instruments Law, § 282.

⁶¹ See Brooks' Notary, 6th ed., p. 88; and cf. *Mitchell v. Baring* (1826), 10 B. & C. 4; 109 E. R.; Indian Act, s. 101.

⁶² But it would scarcely be safe to omit the act of honour. S. 97 saves the law merchant, and for charging parties abroad the usual is certainly the safer course; cf. German Exchange Law, Art. 58; French Code, Art. 126.

⁶³ New York Negotiable Instruments Law, § 285.

⁶⁴ See *Williams v. Germaine* (1827), 7 B. & C. 468, at p. 471; 108 E. R.

⁶⁵ See Story, § 128; *Williams v. Germaine* (1827), 7 B. & C. 468; 108 E. R.; New York Negotiable Instruments Law, § 284.

says : " Effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied if presented to him again when the period of payment had arrived ".⁶⁶ But, by s. 51 (6), where a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary.

Under the continental codes, acceptance for honour is known as acceptance by " intervention ", and the acceptor for honour is in the nature of a *negotiorum gestor*.⁶⁷

Under French Code, Art. 127, Netherlands Code, Art. 127, and German Exchange Law, Art. 58, an acceptor for honour is bound to give notice of his acceptance to the person for whose honour he has accepted. The rights of the acceptor for honour arise on payment. Under German Exchange Law, Art. 65, however, an acceptor for honour who is not called on to pay the bill is nevertheless entitled to a commission of one-third per cent.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.⁶⁸

It seems an acceptor for honour is bound by the estoppels which bind an ordinary acceptor, and also by the estoppels which would bind the party for whose honour he accepted⁶⁹; as to which see ss. 54 and 55.

Presentment to acceptor for honour or in case of need.

67. (1) Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.⁷⁰

By virtue of s. 93, it is sufficient if the bill has been noted, although the protest has not been extended. As to holder's option to resort to case of need see s. 15 and notes thereto.

⁶⁶ *Hoare v. Casenove* (1812), 16 East 891, at p. 898; 104 E. R.

⁶⁷ Story §, 125; Pothier, Nos 113, 114; Nonglart, § 584.

⁶⁸ New York Negotiable Instruments Law, § 283.

⁶⁹ *Phillips v. im Thurn* (1866), L. R. 1 C. P. at p. 471; *S. G. on demurrer* (1866), 18 Q. B. (N.S.) 694; 144 E. R.

⁷⁰ Cf. *Hoare v. Casenove* (1812), 16 East 891; 104 E. R.; German Exchange Law, Arts. 62 and 68; New York Negotiable Instruments Law, § 286.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.⁷¹

As to meaning of place, see p. 158.

This sub-section reproduces the effect of the repealed 6 & 7 Will. 4, c. 58. By s. 92, non-business days are to be excluded in computing the time.

If the bill be not presented in due time to the acceptor for honour, it is conceived that he, and any party who would have been discharged if he had paid the bill, are discharged by the holder's laches; but there is no decision in point.⁷²

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.⁷³

See s. 46 as to excuses for non-presentment and delay; and cf. *Nouguier*, § 588.

(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.⁷⁴

Payment for honour supra protest.

68. (1) Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.⁷⁵

⁷¹ Cf. New York Negotiable Instruments Law, § 287.

⁷² Cf. *Story v. Batten* (1830), 3 Wend. R. 486, New York; German Exchange Law, Art. 60; *Nouguier*, § 583.

⁷³ Cf. New York Negotiable Instruments Law, § 288.

⁷⁴ Cf. *Nouguier*, §§ 1320, 1321; Brooks' Notary, 8th ed., p. 104; German Exchange Law, Arts. 62 and 69; Netherlands Code, Art. 181; New York Negotiable Instruments Law, § 289.

⁷⁵ *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105; cf. *Es v. Wyld* (1860), 2 De G. F. & J. 642; 48 E. R.; Brooks' Notary, 8th ed., p. 102; New York Negotiable Instruments Law, § 300.

By s. 98 it is sufficient if the bill has been noted, although the protest has not been extended. The person for whose account a bill is drawn is commonly called the "third account".

When a bill has been paid *supra protest* it ceases to be negotiable.⁷⁶

Promissory notes are sometimes, though not often, paid *supra protest*.

Payment for honour is known in continental countries as payment by "intervention", which expresses its nature as a *negotiorum gestio*. By French Code, Art. 159, such payment may be made by "*tout intervenant*". But this, it seems, has been interpreted to mean any person other than a party already liable on the bill: *Nouguier*, §§ 1004—1008. There appears no good reason for such limitation,

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.⁷⁷

(3) Payment for honour *supra protest*, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.⁷⁸

(4) The notarial act of honour must be founded on a declaration made by the payor for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.⁷⁹

(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payor for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.⁸⁰

⁷⁶ *Ex p. Swan* (1868), L. R. 6 Eq. 344; *Nouguier*, § 1026; cf. *Deacon v. Stodhart* (1841), 2 M. & Gr. at p. 320; 138 E. R.

⁷⁷ To the same effect, French Code, Art. 159; German Exchange Law, Art. 64; New York Negotiable Instruments Law, § 303.

⁷⁸ Cf. *Ex p. Wylid* (1860), 2 De G. F. & J. 642; *Brooks' Notary*, 4th ed., pp. 108—110, and for forms see pp. 226—228; New York Negotiable Instruments Law, § 301.

⁷⁹ New York Negotiable Instruments Law, § 302.

⁸⁰ *Goodall v. Polhill* (1845), 14 L. J. C. P. 146 (duties, e.g., notice of dishonour); *Ex p. Swan* (1868), L. R. 6 Eq. 344 (rights); cf. *Ex p. Wylid* (1860), 2 De G. F. & J. 642; 45 E. R.; French Code, Art. 159; German Exchange Law, Art. 63; New York Negotiable Instruments Law, § 304.

ILLUSTRATIONS

1 A dishonoured bill is held by the fifth indorsee. If X pays it *supra* protest for the honour of the acceptor, he acquires a right to reimbursement against the acceptor alone if he pays for the honour of the first indorser, he can sue the first indorser and the drawer (provided they have due notice), and the acceptor, but the second and subsequent indorsers are discharged.

2 Bill accepted for the accommodation of the drawer. It is dishonoured and paid *supra* protest by X for the honour of the drawer. X cannot recover from the accommodation acceptor, for he is not a party liable to the drawer.⁸¹

Pothier, Nos. 113, 114, points out that the right of the payor is not, properly speaking, a right of action on the bill, but a right arising out of the *quasi-contract negotiorum gestio*; hence the payor cannot again negotiate the bill, or transfer his rights.

(6) The payor for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payor for honour in damages.⁸²

(7) Where the holder of a bill refuses to receive payment *supra* protest he shall lose his right of recourse against any party who would have been discharged by such payment.⁸³

⁸¹ *Ex p. Lambert* (1806), 13 Ves 179; 33 E. R.; *Daniel*, § 1255, *Parsons on Notes and Bills*, Vol 1, p. 318. See *contra*, *Ex p. Swan* (1868), L. R. 6 Eq 844; but that was a case of cross accounts rather than an accommodation bill, and the words of the section are "parties liable", not "prior parties".

⁸² To same effect, German Exchange Law, Art 68, New York Negotiable Instruments Law, § 306.

⁸³ To same effect, Nougner, § 1009, German Exchange Law, Art. 62; New York Negotiable Instruments Law, § 305.

Lost Instruments

Holder's right to duplicate of lost bill.

69. Where a bill has been lost⁶⁴ before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

This section reproduces the effect of the repealed 9 & 10 Will. 3, c. 17, s. 8. That Act applied only to inland bills for £5 or upwards.⁶⁵ The remedy is still very inadequate, as it gives no power to obtain an indorsement or acceptance over again. The continental codes contain much more elaborate provisions on the subject: see *Nouguier*, §§ 205, 219; German Exchange Law, Art. 66.

Presumably, if the drawer, on tender of indemnity, declined to give a new bill, an action would lie to compel him, and damages might be claimed in the alternative.

As to execution of instruments by order of the Court, see the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 47; and, as to loss in the post of crossed cheques, or other documents for the payment of money issued by the Supreme Court Accountant-General, see s. 114 of that Act.

As to bills in a set, see s. 71. As to serious mutilation and impairment of an instrument without actual loss, see p. 212.

Action on lost bill.

70. In any action or proceeding upon a bill, the Court or a Judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or Judge against the claims of any other person upon the instrument in question.

This section reproduces, with an extension in one direction, the provisions of s. 87 of the Common Law Procedure Act, 1854 (17 & 18

⁶⁴ In *Oss Gesellschaft v Jewish Colonial Trust* (1927), 43 T. L. R. 898, the duty of care incumbent on a bank in sending a cheque to Eastern Europe, which was lost, is considered.

⁶⁵ But see *Walmsley v. Child* (1749), 1 Ves. sen. 841; 27 E. R., and *Rhodes v. Morse* (1850), 14 Jur. 800 (cheque).

Vict. c. 125), set out p. 340. That enactment applied only to actions in the superior Courts. The present section applies to all Courts, and to all proceedings, *e.g.*, proofs in bankruptcy. The provision of the Common Law Procedure Act has not been repealed, because it applies to all negotiable instruments, and not merely to bills and notes. For form of order, see *Chitty's King's Bench Forms* (14th ed.), p. 281. In the note to the form it is said that "orders have been made at Chambers under the C. L. P. Act, 1854, s. 87, where the action is not on the bill or instrument itself, but on the consideration for it".

"If no tender of an indemnity were made before suit", says Willes, J., "the plaintiff would certainly not obtain relief on such terms as to give him the costs of the suit."⁸⁶

At common law, if a negotiable bill or note were lost, no action could be maintained, either on the instrument or on the consideration for it,⁸⁷ even if lost when overdue⁸⁸; but, if its destruction could be proved, it seems the action would lie.⁸⁹

By s. 51 (8) protest may be made on a copy of a lost or destroyed bill.

The fact that a bill has been lost or destroyed does not excuse the omission to give notice of dishonour.⁹⁰ As to presentment to charge drawer and indorsers, see ss. 45 and 46, and notes thereto.

By rule 252 of the Bankruptcy Rules, 1915, subject to any special order of the Court, a bill or note must be produced before proof; and, by rule 269, subject to the provisions of this section, it must be exhibited before dividend. See p. 362.

As to bills lost or delayed through war, see the Bills of Exchange Act, 1914 (4 & 5 Geo. 5, c. 82), a temporary Act which expired in 1922.

⁸⁶ *King v. Zimmerman* (1871), L. R. 6 C. P. 466, at p. 468. Note the order made in that case. See, further, *Jefferson v. Ulster Bank* (1900), 84 Ir. T. L. R. 58.

⁸⁷ *Pierson v. Hutchinson* (1809), 2 Camp. 211; 170 E. R.; *Crowe v. Clay* (1854), 9 Exch. 604; 156 E. R., Ex. Ch.; *aliter*, as to a non-negotiable note, *Wain v. Bailey* (1889), 10 A. & E. 616; 113 E. R.

⁸⁸ *Hansard v. Robinson* (1827), 7 B. & C. 90; 108 E. R. But as to relief in equity, see *Macartney v. Graham* (1828), 2 Sim. 285; 57 E. R.

⁸⁹ *Wright v. Maidstone* (1855), 24 L. J. Ch. 628; cf. *Edge v. Bumford* (1862), 31 L. J. Ch. 805; but see *Crowe v. Clay*, *supra*.

⁹⁰ *Thackray v. Blackett* (1812), 8 Camp. 164; 170 E. R.; *Daniel*, § 1464.

Bill in a Set

Rules as to sets.

71. (1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.⁹¹

If one part of a set omit reference to the rest, it becomes a separate bill in the hands of a *bona fide* holder.⁹² It has been held that an agreement to deliver up an unaccepted bill drawn in a set is an agreement to deliver up all the parts in existence⁹³; and also that a person who negotiates a bill of exchange drawn in a set is bound to deliver up all the parts in his possession, but by negotiating one part he does not warrant that he has the rest.⁹⁴

In England the obligation to give a set is presumably a matter of bargain. Under the continental codes it is a matter of right, and careful machinery is provided to enforce the right. The parts of a set (*duplicata*) must be distinguished from copies (*copie*): *Nouguier*, § 209; and German Exchange Law, Arts. 70—72.

Only one part of a set requires to be stamped. The remaining parts are exempt "unless issued or in some manner negotiated apart" from the stamped part. If the stamped part of a set be lost or destroyed, the unstamped parts are admissible in evidence on proof of such loss or destruction.⁹⁵

Presentment for acceptance is not a negotiation.⁹⁶ Compare the terms of the present Stamp Act, quoted above, with those of the repealed 17 & 18 Vict. c. 88, s. 6, which made it necessary for the holder to hold all the parts of a set.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.⁹⁷

This is probably declaratory. It accords with the continental codes: see *Nouguier*, § 218; German Exchange Law, Art. 67.

⁹¹ Cf. *Société Générale v. Metropolitan Bank* (1878), 27 L. T. (N.S.) 849; and French Code, Art. 110; New York Negotiable Instruments Law, § 810.

⁹² German Exchange Law, Art. 66; and cf. French Code, Art. 147.

⁹³ *Kearney v. West Grenada Co.* (1856), 26 L. J. Ex. 15. *Ratio decidendi* not clear.

⁹⁴ *Pinard v. Klockman* (1868), 32 L. J. Q. B. 82.

⁹⁵ 54 & 55 Vict. c. 88, s. 39 (Stamp Act, 1891), p. 845.

⁹⁶ Cf. *Griffin v. Weatherby* (1868), L. R. 3 Q. B. at p. 760.

⁹⁷ Cf. New York Negotiable Instruments Law, § 812.

The drawer signs all the parts of a set. An indorser sometimes signs all the parts that he holds, but not always. It has been said that an indorser is not bound to pay a dishonoured set unless all the parts bearing his indorsement are delivered up to him or accounted for⁸⁸; but see sub-s. 6. In America it has been held that in the case of an accepted bill it is sufficient if the accepted part be given up, and in the case of an unaccepted bill if the protested part be given up, there being no presumption that the missing parts have been improperly dealt with.⁸⁹

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true holder of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.¹

Is the true owner entitled to get the remaining parts from the person who in good faith has given value for them? There are *dicta* to this effect,² but such a rule seems inconsistent with the rights given by sub-s. 2.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.³

By German Exchange Law, Art. 68, the person who forwards one part of a set for acceptance ought to indicate on the other parts where such part will be found. The person to whom the part has been forwarded for acceptance is bound to deliver it up to or according to orders of the indorsee. This coincides with the practice in England.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be

⁸⁸ *Société Générale v. Metropolitan Bank* (1873), 27 L. T. (N.S.) at p. 854.

⁸⁹ *Downes v. Church* (1899), 18 Peters 205, *per* Story, J.; 8 Kent Com. 100.

¹ New York Negotiable Instruments Law, § 811.

² Cf. *Holdsworth v. Hunter* (1880), 10 B. & C. 449, at pp. 450, 454; 109 E. R.

³ Cf. *Ralli v. Dennistoun* (1851), 6 Exch. at p. 496; 155 E. R.; German Exchange Law, Art. 67; New York Negotiable Instruments Law, § 813.

delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.⁴

“Holder in due course” is defined by s. 29.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.⁵

“Copies”—“Copies” of a bill must be distinguished from the parts of a set. They are not often seen in England. The Act does not regulate them, and there is no case law on the subject. On the Continent they are better known, and the general practice concerning them is well summed up in Arts. 66 and 67 of The Hague Uniform Regulation. They are as follows :—

“Art. 66. Every holder of a bill of exchange has the right to make copies of it. The copy must reproduce the original exactly, with the indorsements and all the other statements thereon. It must specify where the copy ends. It may be indorsed and guaranteed by ‘aval’ in the same manner and with the same effects as the original.”

“Art. 67. The copy must specify the person in possession of the original instrument. This person is bound to hand over the aforesaid instrument to the lawful holder of the copy. If he refuses the holder cannot exercise his rights of recourse against the persons who indorsed the copy until he has had a protest drawn up specifying that the original has not been given up to him on his demand.”

⁴ French Code, Art. 148; New York Negotiable Instruments Law, § 314.

⁵ New York Negotiable Instruments Law, § 315

Conflict of Laws

Rules where laws conflict.

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows :

Requisites in form.

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made.⁶

Stamp.

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.⁷
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in the United Kingdom.⁸

⁶ Cf. *Guératte v. Young* (1851), 4 De G. & S. 217, at p. 228; 64 E. R.; Story, §§ 131—137, Westlake's *Private International Law*, 7th ed., p. 819; Dicey's *Conflict of Laws*, 4th ed., p. 858; German Exchange Law, Art. 85, Nouguiet, §§ 1417—1427. See "issue", "acceptance", and "indorsement" defined by s. 2.

⁷ Cf. Westlake, 7th ed., p. 298; but note the agreement as to Irish Free State stamps, p. 357.

⁸ See *Re Marseilles Co* (1885), 30 Ch D. 598. In that case, which arose on bills made before the Act, the bills were drawn in France by a Frenchman in French in English form (and indorsed in blank) on an English company, who accepted them:—*Held*, that as regarded the acceptor, they were to be treated as English bills, and that the French effect of an indorsement in blank as a mere procuration was immaterial. Cf. Dicey, 4th ed., p. 657.

ILLUSTRATIONS

1 By German law a bill need not express the value received. By French law it must. A bill drawn in Germany, but payable in Paris, which does not express the value received, is valid.

2. By the old law of Illinois a verbal acceptance is valid. A bill drawn in London on a town in Illinois is verbally accepted there. The acceptance is valid.⁹

3 A bill drawn and payable in France expresses no value received, and is therefore invalid according to French law. If it is indorsed in England the indorser could be sued here,¹⁰ though the drawer could not.

4. Bill drawn in New York on Liverpool against consignment of cotton. Whether this is conditional in form or not is (it seems) a question to be determined by American law.¹¹

The contract is made where the delivery is effected, not where the signature is attached.¹² A few foreign writers, among them Savigny, are of opinion that the maxim *Locus regit actum* is always facultative, never disabling. German Exchange Law, Art. 85, and the provisos to this sub-section, go a long way towards adopting that view, but do not accept it in its entirety. In order to establish that a bill is invalid according to the law of the place of issue, the foreign law in point must be proved as a question of fact.

Foreign stamp laws.—Before the Act it had been held in some cases that English Courts were not concerned with the revenue laws of foreign countries.¹³ But the better opinion seemed to be that, if a bill, for want of a stamp, was merely inadmissible in evidence according to the law of the place of its issue, it was admissible in evidence here if it conformed to the requirements of the English stamp laws relating to foreign bills; while, if the want of a stamp rendered it void at the place of issue, it was void everywhere.¹⁴ The Act appears to negative the latter branch of this principle, so far as it relates to bills which are negotiated or payable in a country different from that in which they were drawn. Note the agreement as to Irish Free State stamps, p. 857.

Interpretation.

(2) Subject to the provisions of this Act,¹⁵ the interpretation of the drawing, indorsement, acceptance, or

⁹ Cf. *Scudder v. Union Bank* (1875), 1 Otto, Sup. Ct. U. S. 406, which goes still further.

¹⁰ Cf. *Wynne v. Jackson* (1826), 2 Russ. 351 and 684; 38 E. R.

¹¹ *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K. B. 629, C. A.

¹² *Chapman v. Cottrell* (1865), 34 L. J. Ex. 186. Cf. *Bank of Montreal v. Exhibit and Trading Co.* (1906), 11 Com. Cas. 250. As to delivery, see s. 21, and notes thereto.

¹³ *Wynne v. Jackson* (1826), 2 Russ. 351; 38 E. R.; *James v. Catherwood* (1823), 3 D. & R. 190.

¹⁴ *Bristol v. Sequenville* (1850), 5 Exch. 275; 155 E. R.; cf. *Clegg v. Levy* (1812), 3 Camp. 166; 170 E. R., Story, § 137.

¹⁵ For the provisions referred to, see the remaining sub-sections, s. 57 (damages), and, perhaps, ss. 15 (case of need) and 53 (funds in hands of drawee).

acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.¹⁶

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom.¹⁷

ILLUSTRATIONS

1. An English note payable to bearer is negotiated by delivery in a country where this mode of transfer is not recognised. The title to the note passes by such delivery.¹⁸

2. Action in England on a bill drawn in Belgium, and indorsed in blank in France. The effect of such indorsement is determined according to French law, *i.e.*, it operates as a "procuration".¹⁹

3. A general acceptance given in Paris is to be interpreted according to French law.²⁰

4. Note made and payable in Scotland in the form "Pay to C", without adding the words "or order". Before the Act such a note was negotiable by Scots law, though not by English law, but it could be negotiated by indorsement in England.²¹

5. A cheque drawn abroad on a London bank is stolen, and the indorsement of the first indorsee is forged. A Vienna bank cashes the cheque, and according to Austrian law acquires a good title thereto. The Vienna bank transmits the cheque to a London bank, who receive the amount from the bank on which it was drawn. The London bank is not guilty of conversion.²²

The term "interpretation", in this sub-section, it is submitted, clearly includes the obligations of the parties as deduced from such interpretation.²³

Story, § 151, points out the reasons of the rule adopted in this sub-section. "It has sometimes been suggested", he says, "that this doctrine is a departure from the rule that the law of the place

¹⁶ *Allen v. Kemble* (1848), 6 Moore P. C. 814; 18 E. R.; Story on Conflict of Laws, § 341; *Horne v. Rouquette* (1878), 3 Q. B. D. at p. 520, *per* Brett, L.J.; Dicey on Conflict of Laws, 4th ed., p. 662.

¹⁷ *Lebel v. Tucker* (1887), L. R. 3 Q. B. 77.

¹⁸ *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385; 109 E. R.

¹⁹ *Trimby v. Vignier* (1834), 1 Bing. N. C. 151; 131 E. R.; *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538, *per* Willes, J. These cases were overruled by *Bradlaugh v. De Rin* (1870), L. R. 5 C. P. 478, on the question of fact whether the indorsee could, according to French law, sue the holder in his own name, but the principle that the indorsement must be interpreted by French law was not questioned. See now the French law of February 8, 1922, which gives effect to an indorsement in blank as a complete negotiation of the bill.

²⁰ *Cf. Don v. Lippmann* (1837), 5 Cl. & F. at pp. 12, 13; 7 E. R., H. L.; Story, § 147.

²¹ *Robertson v. Burdakin* (1843), 1 Ross, Scots L. C. 824. See now s. 9 (1) (4).

²² *Embricos v. Anglo-Austrian Bank*, [1905] 1 K. B. 677, C. A. Qu. whether the drawer could be sued on these facts if the cheque had been stopped. *Cf. Dicey's Conflict of Laws*, 4th ed., pp. 575, 580.

²³ *Cf. Westlake's Private International Law*, 5th ed., § 229; *Alcock v. Smith*, [1892] 1 Ch. at p. 256 (interpretation=legal effect); *Allen v. Kemble* (1848), 6 Moore P. C. 814; 13 E. R. (bill drawn in Demerara on Scotland, accepted payable in London—drawer discharged by *compensatio* according to Demerara law); *Koschlin & Cie. v. Kastenbaum Bros.* (1927) 96 L. J. K. B. 675 (French bill payable to order, indorsed by agent in his own name, only).

of payment is to govern. But, correctly considered, it is entirely in conformity with that rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree upon due notice to reimburse the holder in principal and damages where they respectively entered into the contract."

The case of a bill accepted in one country but payable in another gives rise to a difficulty. Suppose a bill is accepted in France, payable in England. Probably the maxim *Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit* would apply.²⁴ But, if not, then comes the question, what is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the *lex loci solutionis* would be regarded: cf. *Nouguier*, § 1419.

Transfer abroad.—Although *Embiricos v. Anglo-Austrian Bank* (Illustration 5) may be regarded as an application of sub-s. 2, yet it undoubtedly goes further, and supplements the section by declaring that, *quoad* transfer in a foreign country, bills and notes must be regarded as chattels, and as subject to the ordinary rules which regulate the transfer of chattels. "The rule that the transfer of chattels must be governed by the law of the country in which the transfer takes place applies to a bill or cheque."²⁵ S. 72 is not exhaustive, and s. 97 (2) saves common law when not inconsistent with the Act. The rules of private international law, as administered by our Courts, are part of the common law.

Consideration.—Where a cheque is drawn by an Englishman in French territory on a bank in London, it seems that the legality of the instrument must be determined by English law,²⁶ although the validity of the consideration will be judged by French law.²⁷

²⁴ *Robinson v. Bland* (1760), 2 Burr. 1077; 97 E. R. (bill accepted in France payable in England); cf. *Moulis v. Owen*, [1907] 1 K. B. at pp. 754, 755, C. A. (cheque drawn in France on bank in London).

²⁵ *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. at p. 688, C. A., following *Alcock v. Smith*, [1892] 1 Ch. 286, C. A. (bill taken in execution in Norway). The rule that the legal effect of the assignment of a chose in action is determined by the law of the country where it takes place has recently been reaffirmed in *Republica de Guatemala v. Nuñez* (1926), 96 L. J. K. B. 441. As to receiving property stolen abroad, see s. 83 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50).

²⁶ *Moulis v. Owen*, [1907] 1 K. B. 746, C. A., Moulton, L.J., dissenting (cheque for money borrowed to pay losses at baccarat); discussed, Dicey on Conflict of Laws, 4th ed., pp. 595, 596; Law Quarterly Review, vol. 28, p. 127, by A. Cohen, K.C.

²⁷ *Saaby v. Fulton*, [1909] 2 K. B. 208, C. A. Cf. *Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153 (cheque drawn for losses at gaming in England held void). Cf. *Société Anonyme des Grands Établissements v. Baumgart* (1927), 96 L. J. K. B. 789. But if fraud or duress be involved, no action can be maintained in England, *Société des Hôtels Réunis v. Hawker* (1918), 20 T. L. R. 378 (cheque given in France on London under threat of prosecution).

Measure of damages.—The cases seem to regard the measure of damages on the breach of the contracts on a bill as resting on the same principles as the interpretation of those contracts²⁸; but it may be questioned whether the measure of damages comes within the meaning of the word “interpretation” in its present context in the Act. Subject to the positive provisions of s. 57, the rule with respect to damages appears to be that “the place at which each party to a bill or note undertakes that *he himself* will pay it, determines with regard to him the *lex loci contractus* according to which his liability is governed”.²⁹ Thus, where a bill was drawn in California on Washington, and was dishonoured, it was held that damages against the drawer must be measured by Californian law, and that as part of those damages he must pay interest at the Californian rate³⁰; and it seems clear on principle that damages against an indorser should be measured by the law of the country where he indorsed the bill.³¹ Where a bill was accepted in Paris, payable in London, it was held that interest was payable according to the English and not according to the French rate.³²

Discharge when laws conflict.—So, again, when laws conflict, the validity and effect of a discharge is determined by the law of the place where the contract in question was made.³³ For example :—

1. Bill accepted at Leghorn payable there. By the old law of Leghorn an acceptor could procure the cancellation of his acceptance if he had not at maturity received funds from the drawer. An acceptor so discharged at Leghorn cannot be sued in England.³⁴

2. Bill drawn in United States (and issued there) on a person in England is dishonoured by non-acceptance. The drawer cannot be sued in England if he has been discharged in America under the bankruptcy law there in force.³⁵

3. Bill for £100 drawn and issued in Demerara, but accepted and payable in England. At the time the bill matures the holder owes the acceptor £100. According to Demerara law this operates as a discharge of the bill (by *compensatio*). The drawer is discharged.³⁶

4. Accommodation bill drawn and issued in Austria, but accepted and payable in England, is dishonoured. The holder receives from the drawer in Austria a

²⁸ See the language of *Allen v. Kemble* (1848), 6 Moore P. C. at pp. 321, 322; 13 E. R.

²⁹ Mayne on Damages, 10th ed., p. 270; Story on Conflict of Laws, § 815.

³⁰ *Gibbs v. Fremont* (1863), 9 Exch. 25; cf. *Ex p. Meredith* (1863), 32 L. J. Ch. 300.

³¹ Mayne on Damages, 10th ed., p. 270; Story on Conflict of Laws, §§ 814, 815; but see the point regarded as open in *Gibbs v. Fremont*, *supra*.

³² *Cooper v. Earl Waldegrave* (1840), 2 Beav. 282; 48 E. R.

³³ *Ol. Ellis v. M'Henry* (1871), L. R. 6 C. P. at p. 234; Story, §§ 163—165.

³⁴ *Burrows v. Jemino* (1726), 2 Stra. 798; 98 E. R.; cf. *Gibbs v. Société des Métaux* (1890), 25 Q. B. D. at pp. 407, 408, C. A.

³⁵ *Potter v. Brown* (1804), 5 East 124; 102 E. R.; cf. *Symons v. May* (1851), 6 Exch. 707; 155 E. R.

³⁶ *Allen v. Kemble* (1848), 6 Moore P. C. 815; 13 E. R.; cf. *Wilkinson v. Simson* (1838), 2 Moore P. C. 275; 12 E. R. *Compensatio* is recognised as a discharge in all countries where civil law prevails. See further on that subject, Nouguiet, §§ 1053—1060; French Code Civil, Arts. 289—299.

smaller sum in satisfaction of the bill. This, according to Austrian law, is a valid discharge. A subsequent indorsee cannot recover from the acceptor in England.³⁷

5. Bill drawn, accepted and payable in England. The acceptor is made bankrupt, and receives his discharge in Australia. He can be sued on the bill in England.³⁸

6. Action on a promissory note made in France. Plea that the suit was barred by the French law of prescription, which was five years. Held, that the French law in question was a law of procedure, and that the action could only be barred by the English Statute of Limitations.³⁹

Holder's duties.

- (8) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.⁴⁰

ILLUSTRATIONS

1. Defendant indorsed to plaintiff in England a bill payable in Paris. Plaintiff indorsed to a Frenchman, who on dishonour protested it, and transmitted notice of protest to defendant in accordance with French law. Held, that plaintiff could recover from defendant, though he had not given him notice of dishonour according to English law.⁴¹

2. Bill drawn in England, payable in Spain, is indorsed in England by defendant to plaintiff. Plaintiff indorses it to D in Spain. It is dishonoured by non-acceptance, and twelve days afterwards D writes to give notice of this to plaintiff. Plaintiff at once gives notice to defendant. By Spanish law no notice of dishonour by non-acceptance is required. Plaintiff can recover from defendant.⁴²

The sub-section is a further application of the maxim *Locus regit actum*.⁴³ See to the like effect German Exchange Law, Art. 86.

Amount expressed in foreign currency.

- (4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for

³⁷ *Ralli v. Dennistoun* (1851), 6 Exch. 488, 36th plea and judgment at p. 498; 155 E. R.

³⁸ *Bartley v. Hodges* (1861), 30 L. J. Q. B. 352; Story, § 165; cf. *Gibbs v. Société des Métaux* (1890), 25 Q. B. D. 899, C. A.

³⁹ *Huber v. Steiner* (1885), 2 Bing. N. C. 202; 182 E. R.

⁴⁰ Story, § 176; Pardessus, Arts. 1496, 1499; Pothier, No. 57; Dicey, 4th ed., p. 665.

⁴¹ *Hirschfeld v. Smith* (1886), L. R. 1 C. P. 840.

⁴² *Horne v. Rouquette* (1878), 3 Q. B. D. 511, C. A.; and cf. *Rouquette v. Oppermann* (1878), L. R. 10 Q. B. 525 (effect of French moratorium).

⁴³ See a criticism on the language of the sub-section, Westlake's *International Law*, 7th ed., p. 322. His suggestion that "act" includes "omission" is presumably correct.

sight drafts at the place of payment on the day the bill is payable.⁴⁴

ILLUSTRATION

Bill for 1,000 francs, payable three months after date, is drawn in France on London. The amount in English money the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable.

The amount of the bill for stamp purposes is necessarily calculated on a different principle: see Stamp Act, 1891, s. 6, p. 846.

Due date.

- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

ILLUSTRATIONS

1. By English law days of grace are allowed on bills payable after date. By French law they are not. A bill drawn in Paris on London is entitled to three days' grace, but a bill drawn in London on Paris is not entitled to grace.⁴⁵

2. A bill is drawn in England payable in Paris three months after date. After it is drawn, but before it is due, a "moratory" law is passed in France, in consequence of war, postponing the maturity of all current bills for one month. The maturity of this bill is for all purposes to be determined by French law.⁴⁶

3. A bill accepted and payable in Germany is held by an English bank. War breaks out before the bill matures, and a German moratory law postpones payment indefinitely, and provides that interest shall not be payable for the period between the due date and the conclusion of the moratorium. The maturity of the bill depends on German law.⁴⁷

Where a bill is drawn in a country where the old style prevails, and is dated accordingly, there is no conflict of laws, but only a conflict of calendars. Thus, if a bill be drawn in a country using the old style (if there are any such countries now, see p. 86) on London bearing date January 1, it must be dealt with in England as a bill dated January 14; that is to say, the old style date must be translated into the Gregorian date.⁴⁸ Russian bills payable after date in England used to bear both the eastern and western date, the maturity being calculated according to the western date.

⁴⁴ Cf. *Hirschfield v. Smith* (1866), L. R. 1 C. P. at p. 858; Belgian Code, Art. 88; Dicey on Conflict of Laws, 4th ed., p. 866. As to stipulations fixing rate of exchange, see s. 9 (3). As to calculating the exchange where a cheque was drawn in England payable in francs, see *Cohn v. Boulken* (1920), 86 T. L. R. 767 (date of trial); dissented from, *Ukendahl v. Pankhurst & Co.* (1928), 39 T. L. R. 698 (date of dishonour).

⁴⁵ *Bouguette v. Overmann* (1875), L. R. 10 Q. B. 525, at pp. 535-538; the effect of the Bank Holiday Acts is discussed at p. 538.

⁴⁶ *Ibid.* So held also in Italy and at Geneva; see at p. 535. Cf. Dicey, 4th ed., p. 867.

⁴⁷ *Re Franke and Rasch*, [1918] 1 Ch. 470.

⁴⁸ For a table of corresponding dates, see Whitaker's Almanack. In 1928 the Russian, Greek, Serbian and Roumanian Churches adopted the Gregorian Calendar with slight modifications.

Proof of foreign law.—When a question arises as to the law of a foreign country it must be proved as a fact in the case by the evidence of lawyers or other experts belonging to the country in question.⁴⁹ In the absence of such evidence the foreign rule, it seems, is presumed to be the same as the English rule.⁵⁰

In jury cases, where evidence is given as to foreign law its effect must be determined by the Judge and not by the jury: see s. 15 of the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), and, as to Supreme Court, s. 102 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49).

⁴⁹ Westlake's Private International Law, 7th ed., p. 423; *Concha v. Murietta* (1890), 40 Ch. D. 543, C. A.; cf. *Perlak Petroleum Co. v. Deen*, [1924] 1 K. B. 111, C. A. (interrogatories to non expert); *St. Pierre v. S. American Stores*, [1937] 1 A. E. R. 206.

⁵⁰ *The Parchim*, [1918] A. C. 157, P. C., at p. 161, *per* Lord Parker.

PART III

CHEQUES ON A BANKER

Cheque defined.

73. A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.⁵¹

"A cheque", said Baron-Parke, "is a peculiar sort of instrument, in many respects resembling a bill of exchange but in some entirely different".⁵²

ILLUSTRATIONS

1. Instrument in the form of a cheque, ordering the bank to pay the sum mentioned "provided the receipt form at foot hereof is duly signed, stamped, and dated". This is not a cheque, as it qualifies the direct order to pay and is therefore not an unconditional order to pay the money.⁵³

2. Instrument in form of receipt issued by a bank for use of its customers, after signature by them, in drawing sums under £2. This is not a cheque.⁵⁴

3. A gives C a cheque on a blank sheet of paper, writing on it the words "to be retained", and promising him to substitute another cheque on a proper banker's form. This he does not do. The cheque is a valid cheque, for it is an unconditional order to the banker, the words in question being only a direction to the payee.⁵⁵

4. An instrument in the form of a cheque but requiring the payee to sign a receipt form on the back is probably not a cheque within the meaning of this section.⁵⁶

5. An instrument in the form of a cheque made payable to "cash" is not a cheque, although a bank paying in compliance with such a mandate to the servant or agent of the customer obtains a good discharge.⁵⁷

See "bill of exchange" defined by s. 8 and "banker" by s. 2. By s. 10 a bill is payable on demand, which is expressed to be

⁵¹ New York Negotiable Instruments Law, § 821.

⁵² *Ranchurn Mullick v. Luchmesechund Radakissen*, 9 Moo. P. C. 48 at p. 69.

⁵³ *Bavins v. London & S. W. Bank*, [1900] 1 Q. B. 270, C. A.; cf. *Capital & Counties Bank v. Gordon*, [1903] A. C. at p. 252, per Lord Lindley. *Aliter*, where a note at the bottom of the cheque ran "the receipt at back hereof must be signed, etc.", for this is a direction to the payee, not to the banker: *Nathan v. Ogdens, Ltd.* (1905), 98 L. T. 126, C. A.; and cf. *Thairtnall v. Great Northern Ry.*, [1910] 2 K. B. 509 (dividend warrant).

⁵⁴ *Midland Bank v. Inland Revenue Commissioners*, [1927] 2 K. B. 465; but it is a bill for stamp purposes (see p. 348).

⁵⁵ *Roberts v. Marsh*, [1915] 1 K. B. 42, C. A.; cf. *Glen v. Semple* (1901), 8 F. 1124, Court of Session (cheque running "pay against cheque" or cash). Cf. *Hibernian Bank, Ltd. v. Gysin and another*, [1939] 1 K. B. 438.

⁵⁶ *London & Montrose Shipbuilding Co. v. Barclays Bank* (1926), 31 Com. Cas. 67; reversed on facts, not on law, *ibid.* p. 182. Anyhow, it is a "document" within the meaning of the Revenue Act, 1888, p. 344, and therefore entitled to the protection of s. 82 (crossed cheques).

⁵⁷ *North & S. Incoa. Corp. v. Nat. Prov. Bank*, [1936] 1 K. B. 328.

payable on demand, or at sight, or on presentation, or in which no time for payment is expressed.

The act is declaratory in so far as it defines a cheque as a bill of exchange.⁵⁵ It is no part of the definition that a cheque should be an inland bill, or that it should be drawn by a *customer* upon his banker. Formerly cheques were exempt from stamp duty, but they were required to be issued within fifteen miles of the bank on which they were drawn. The enactments requiring this to be done have long been repealed.⁵⁶ *Qu.* whether an instrument in the form of a cheque but requiring the payee to sign a receipt form on the back is a cheque within the meaning of s. 78; see p. 242, notes 58 and 56.

By s. 7 of the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), coupons attached to stock certificates to bearer under that Act are to be deemed to be cheques on a banker for the purpose of any enactment relating to cheques, other than a stamp act. By rule 5 of Sched. III to the Finance Act, 1921 (11 & 12 Geo. 5, c. 82), "a warrant given by the Bank for the payment of the redemption money for Government Stock shall be deemed to be a cheque within the meaning of the Bills of Exchange Act, 1882, and shall be exempt from stamp duty". The Bills of Exchange Act Amendment Act, 1982, enacts that a banker's draft shall be deemed a cheque for the purposes of ss. 76 to 82.

Cheques are compared with and distinguished from ordinary bills of exchange by Parke, B.,⁵⁷ Erle, J., and Byles, J.,⁵⁸ Pallett, C.B.,⁵⁹ and the Supreme Court of the United States.⁶⁰ All cheques are bills of exchange, but all bills of exchange are not cheques; therefore, an authority to draw cheques does not necessarily include an authority to draw bills.⁶¹ But apart from statute, the distinctions between cheques and ordinary bills of exchange arise from the relationship of banker and customer subsisting between the drawer and drawee of a cheque. A cheque is intended for prompt presentment, while a note payable on demand is deemed to be a continuing security.⁶²

A cheque is not intended to be accepted,⁶³ but at common law there is no objection to the acceptance of a cheque if the holder wishes to

⁵⁵ *M'Lean v. Clydesdale Bank* (1888), 9 App. Cas. 95, per Lord Blackburn.

⁵⁶ *M'Lean v. Clydesdale Bank* (1888), 9 App. Cas. at p. 106.

⁵⁷ *Ramohurn Mullick v. Luchmesechund Badakissen* (1854), 9 Moore P. C. at p. 69; 14 B. R.; cf. *Serie v. Norton* (1841), 2 Moo. & Rob. at p. 404; 174 E. R. Cf. *Slingsby v. Westminster Bank* (No. 2), [1981] 2 K. B. 588, *supra*, p. 205.

⁵⁸ *Keane v. Beard* (1860), 8 C. B. (N.S.) at pp. 880, 881, as modified by *Hopkinson v. Forster* (1874), L. R. 19 Eq. at p. 76, Jessel, M.R.

⁵⁹ *Lynn v. Bell* (1878), 10 Ir. R. O. L. at p. 490.

⁶⁰ *Merchants' Bank v. State Bank* (1870), 10 Wallace, at p. 647.

⁶¹ *Forster v. Mackreth* (1867), L. R. 2 Ex. 168.

⁶² *Brooks v. Mitchell* (1841), 9 M. & W. at p. 18; 152 E. R.; Parke, B.; *Chartered Bank v. Dickson* (1871), L. R. 8 P. C. at p. 579, Lord Cairns.

⁶³ *Of. Bellamy v. Marjoribanks* (1852), 7 Exch. at p. 404, where the Court said that acceptance although not usual was legal and was a practice hardly existing in

have this done instead of taking immediate payment, but the Bank Charter Acts would in many cases render this illegal; such an instrument would be substantially a bank note. As to post-dated cheques, see note to s. 18 (2). As to when a cheque becomes stale, so as to be on the footing of an overdue bill, see s. 86 (8). As to excuses for omitting to give notice of dishonour, see s. 50 (2), especially clause (c). An affidavit under Order XIV, verifying the cause of action, need not specifically allege that notice of the dishonour of a cheque has been given, or that it is excused,⁶⁷ but this must be stated in the specially indorsed writ.⁶⁸ As to cheques for less than twenty shillings in Scotland, see note to s. 3. As to forged indorsements on cheques, see s. 60.

Certified or marked cheques.—The Judicial Committee of the Privy Council has recently considered very fully the effect of certifying a cheque, when they held that a banker's business does not normally involve that the manager has ostensible authority to certify post-dated cheques, and that the certification of a cheque does not constitute an acceptance within the Indian Negotiable Instruments Act, 1881, or the Bills of Exchange Act, 1882. Acceptance of a cheque is such an unusual event that nothing short of an express and clear wording of acceptance would be treated as acceptance.⁶⁹ "It is not necessary categorically to hold that a cheque can never be accepted; it is enough to say that it is only done in very unusual and special circumstances." "Marking or certification has been known in England as a very limited practice apparently referred to by the Court in 1810 in *Robson v. Bennett*. That is a practice between bankers for the purpose of clearing." "That is its only judicial recognition."⁷⁰ The Court further held that the certification of a post-dated cheque did not amount to a representation or constitute any promise (in any case there was no consideration for it). The certification at the most could raise only an expectation that the cheque would be met. Whether the certification of a cheque which is not post-dated may not be a representation that funds were available to meet it was not decided. In Canada the practice of certifying cheques prevails; and in two appeals from Canada it has been held by the Privy Council that where a cheque is marked or certified by being initialed by the bank on which it is drawn, the marking operates as a representation that the bank, at the time of

England. "No case is reported in England or India, so far as we are aware, of a banker being held liable, or even sued, as acceptor of a cheque drawn upon him." *Per Lord Wright*, [1944] A. C. at p. 188.

⁶⁷ *May v. Chidley*, [1894] 1 Q. B. 451.

⁶⁸ *Roberts v. Plant*, [1895] 1 Q. B. 597, C. A.

⁶⁹ *Bank of Baroda v. Punjab National Bank, Ltd.*, [1944] A. C. 176.

⁷⁰ *Ibid.* at p. 187; *ibid.* at p. 185; *ibid.* at p. 187.

certifying, has funds of the drawer in its hands sufficient to meet payment of the cheque, but, at any rate in the absence of any specific usage, the marking appears to have no other effect.⁷¹ It is clearly not an acceptance that the holder can take advantage of: see s. 17 (2). As to certified cheques in the United States, see *Daniel*, §§ 1601—1611. Under §§ 323—325 of New York Negotiable Instruments Law, the certification of a cheque is equivalent to an acceptance, but when procured by the holder discharges the drawer and indorsers. It further operates as an assignment of funds.

Foreign laws.—The various foreign laws relating to cheques are carefully collated and reviewed in *Le Cheque, théorie et pratique*, published in 1924 by M. Jaques Bouteron, Inspector of the Bank of France. The French law defines a cheque as “*L’écrit qui sous la forme d’un mandat de paiement sert au tireur à effectuer le retrait son profit ou au profit d’un tiers de tout ou partie des fonds portés au crédit de son compte et disponible*”.⁷² As to Italy, see Italian Com. Code, Arts. 339—344. Germany in 1908 passed a new law dealing with cheques.⁷³ The continental codes do not require a cheque to be drawn on a banker, and in mercantile language foreign demand drafts are frequently referred to as cheques, though not drawn on a banker.

Presentment of cheque for payment.

74. Subject to the provisions of this Act⁷⁴—

- (1) Where a cheque is not presented for payment within a reasonable time⁷⁵ of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker

⁷¹ *Gaden v Newfoundland Savings Bank*, [1899] A. C. 281, P. C.; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, P. C.; and cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at pp. 351, 352, per Cockburn, C.J., who says as regards England, “A custom has grown up among bankers themselves of marking cheques for the purpose of clearing, by which they become bound to one another”. See also Paget on Banking, 4th ed., pp. 164—169.

⁷² *Loi du 28 Mai, 1865*. For subsequent minor amendments, see Bouteron.

⁷³ See an article in the *Journal of the Society of Comparative Legislation* for August, 1908, comparing the provisions of the new German law with English law. For an English translation, see *Journal of Institute of Bankers*, May, 1908.

⁷⁴ S. 48 (excuses for non-presentment and delay in presentment).

⁷⁵ See *Wheeler v. Young* (1897), 13 T. L. R. 468 (reasonable time a question of fact for the jury).

to a larger amount than he would have been had such cheque been paid.⁷⁶

Reasonable time.

- (2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.⁷⁷

Rights of holder when drawer is discharged.

- (3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

This section alters the previous law. It was introduced in the Lords by Lord Bramwell to mitigate the rigour of the common law rule. At common law the mere omission to present a cheque for payment did not discharge the drawer until at any rate six years had elapsed,⁷⁸ and in this respect the common law appears unaltered. But if a cheque was not presented within a reasonable time, as defined by the cases, and the drawer suffered actual damage by the delay, e.g., by the failure of the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound.⁷⁹ By virtue of s. 45 (2) the indorser of a cheque will be discharged unless it is presented for payment within a reasonable time (after indorsement) as defined by the Act.⁸⁰

Sub-s. 2 introduces a new and less rigorous measure of reasonable time. The common law rule may be stated as follows:—

A cheque was deemed to have been presented within a reasonable time when presented according to the following rules:—

- (1) If the person who received a cheque and the banker on whom it was drawn were in the same place the cheque had, in the absence of special circumstances,⁸¹ to be presented for payment on the day after its receipt.⁸²

⁷⁶ Cf. New York Negotiable Instruments Law, § 822.

⁷⁷ See *King v. Porter*, Northern Ireland Reports, [1925] C. A., p. 107 (cheque forgotten for three years, no actual damage, drawer liable).

⁷⁸ *Laws v. Rand* (1857), 27 L. J. C. P. 78; *Heywood v. Pickering* (1874), L. R. 9 Q. B. at p. 492; *Knyon v. Stanton* (1878), 28 Amer. R. 601. As a reason for the six-year limit, see *Pott v. Glegg* (1847), 16 M. & W. 321; 155 E. R.

⁷⁹ *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; 185 E. R.; *Robinson v. Hawksford* (1846), 9 Q. B. 52; 115 E. R.; *Bailey v. Bodenham* (1864), 38 L. J. C. P. 262.

⁸⁰ Cf. *Smith v. Jones* (1898), 20 Wend. 192, New York. No English decision.

⁸¹ *Firth v. Brooks* (1861), 4 L. T. (N.S.) 467.

⁸² *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; 185 E. R.

- (2) If the person who receive a cheque and the banker on whom it was drawn were in different places the cheque had, in the absence of special circumstances, to be forwarded for presentment on the day after it was received, and the agent to whom it was forwarded had, in like manner, to present it or forward it on the day after he received it.⁸³
- (8) In computing time non-business days were excluded⁸⁴; and when a cheque was crossed any delay caused by presenting the cheque pursuant to the crossing was presumably excused.⁸⁵

The result of the cases seemed to be this. A party who received a cheque had a clear day for presenting or forwarding it. If, instead of presenting it himself, he forwarded it to someone else to present, the question was, had he acted reasonably in so doing? A principal, of course, is responsible to third parties for the act of his agents, e.g., if a person forwards a cheque to an agent, and the agent, instead of presenting it himself, unreasonably forwards it to another agent, the loss as regards third parties falls on the principal, though he may have a remedy over against his agent. It would seem that these rules are swept into limbo by s. 74 (2); it is now a question of mercantile practice (and no doubt domestic practice also); it may well be doubted whether the citizen in his private affairs or even any professional man or every business man makes a habit of paying in cheques the day after receiving them. Reasonable time is a question of fact, to be so decided by the jury or Judge in these days.⁸⁶

The question whether a cheque has been presented within a reasonable time may arise between drawer and holder, or between indorser and indorsee, or between transferor by delivery and transferee,⁸⁷ or between customer and banker.⁸⁸ In each case it must be determined as between the particular parties. See a different standard of reasonable time as between vendor and vendee where the vendor of goods was paid by the cheque of the vendee's agent.⁸⁹

The effect of sub-s. 8, read with sub-s. 1, appears to be this:—

A person draws a cheque for £100 on his banker, which is not presented for payment within a reasonable time of its issue as defined by the Act. The banker fails, the drawer having at the time of the failure sufficient money to his credit to meet the cheque. The drawer is discharged, but the holder can prove for £100 against the banker's

⁸³ *Hare v. Henty* (1861), 30 L. J. C P 302; *Prideaux v. Criddle* (1869), L. R. 4 Q B 455; *Heywood v. Pickering* (1874), L. R. 9 Q. B. 428.

⁸⁴ Cf. 34 & 35 Vict. c. 17; and see s. 92.

⁸⁵ Cf. *Alexander v. Burchfield* (1842), 7 M & Gr. at p. 1067; 135 E. R. Since this case the crossing of cheques has received legislative sanction

⁸⁶ *Wheeler v. Young* (1897), 18 T. L. R. 468.

⁸⁷ See, e.g., *Mouls v. Brown* (1838), 4 Bing. N. C. 266; 132 E. R.

⁸⁸ See, e.g., *Hare v. Henty* (1861), 10 C B (N s.) 65.

⁸⁹ *Hopkins v. Ware* (1869), L. R. 4 Ex. 268.

estate. If, however, the drawer had no funds to his credit, but was authorised to overdraw, the drawer would still be discharged; but the holder could not prove against the banker's estate.⁹⁰

Revocation of banker's authority.

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

- (1) Countermand of payment⁹¹;
- (2) Notice of the customer's death.⁹²

ILLUSTRATIONS

1. A draws a cheque for £60 in favour of C. The same day, after business hours, he telegraphs to his bank to stop the cheque. By an oversight of the clerks, the telegram is not brought to the manager's notice till two days later, and the cheque in the meantime has been paid. This is not an effective countermand, and the bank can debit A's account with the amount of the cheque.⁹³

2. A draws a cheque at such an hour that the payee cannot present it before three o'clock, the closing hour of A's bank. The cheque is presented and paid after three o'clock, a countermand by A coming too late to prevent it. The bank is justified in paying within a reasonable time of their advertised closing hour.⁹⁴

3. A firm of two partners has a banking account. One of them dies. The authority of the surviving partner to draw cheques on the firm account is not (it seems) thereby determined.⁹⁵

4. One partner in a firm directs the banker not to pay a firm cheque. The banker (it seems) is justified in acting on this instruction.⁹⁶

5. The drawer of a cheque telegraphs to his bankers: "Stop payment of cheque No. 7288 for £8 ls. 6d. to R at —." He does not mention that the cheque was post-dated. The bank puts a stop order on cheque No. 7288. The cheque intended to be stopped was No. 7285. When that cheque comes forward the bank, thinking it referred to another transaction, pay it. They can debit his account with the amount.⁹⁷

6. A draws a cheque for £700, and gives it to C. The bank withholds payment owing to a doubt as to the drawer's signature. Before the doubt is cleared up A dies. The gift is incomplete, and the donee cannot get the money.⁹⁸

⁹⁰ The present editor fails to understand this statement. How is the drawer damaged if he has to pay the holder of the cheque instead of the liquidator or trustee in bankruptcy of his bank? The crucial time is not when the cheque was drawn or ought to have been presented, but when the bank fails. If between the issue of the cheque and the bank's failure sufficient funds were paid in to clear the overdraft and meet the cheque, the drawer would presumably be discharged. But why then should the holder have no claim against the bank?

⁹¹ Cf. *Cohen v. Hale* (1878), 3 Q. B. D. 371; *M'Lean v. Clydesdale Bank* (1868), 9 App. Cas. 95.

⁹² *Rogerson v. Ladbroke* (1822), 1 Bing. 98; 130 E. R.

⁹³ *Curtice v. London City and Midland Bank*, [1908] 1 K. B. 208, C. A. As to paying a draft contrary to standing instructions, see *Twibell v. London Suburban Bank*, [1869] W. N. p. 127.

⁹⁴ *Baines v. National Provincial Bank* (1927), 96 L. J. K. B. 801.

⁹⁵ *Backhouse v. Charlton* (1878), 8 Ch. D. 444; see, too, *Usher v. Dauncey* (1814), 4 Camp. 97; 171 E. R.

⁹⁶ *Lindley on Partnership*, 9th ed., p. 192.

⁹⁷ *Westminster Bank v. Hilton* (1926), 43 T. L. R. 124, H. L., reversing C. A., [1926] W. N. 852.

⁹⁸ *Re Swinburne*, [1926] 1 Ch. 88, C. A., disapproving *Bromley v. Brunton* (1868), L. R. 6 Eq. 275 (*donatio mortis causa*).

Donatio mortis causa.—A cheque given by the drawer in contemplation of death must be presented⁹⁰ for payment by the donee before the drawer's death in order to entitle the donee to receive the amount out of the drawer's estate as a *donatio mortis causa*. For example :—

1. A draws a cheque in favour of C, and in contemplation of death hands it to him as a gift. After A's death it is presented and payment refused. C cannot claim for the amount against A's estate.¹

2. A, in contemplation of death, draws a cheque and gives it to C. After A's death C presents the cheque, and the bankers, in ignorance of A's death, pay it. C can (probably) retain the money as against A's representatives.²

3. A, in contemplation of death, draws a cheque and gives it to C. Before A's death C negotiates the cheque for value. The holder can claim for the amount against A's estate.³

4. A, in contemplation of death, draws a cheque and gives it to C, who presents it for payment before A's death. A's account is overdrawn, but the banker refuses to pay the cheque because doubtful of the drawer's signature. C, the donee, is not entitled to receive the amount out of the drawer's estate, and it makes no difference that the bank manager has promised that the cheque will be met.⁴

Gift.—The position of the donee of a cheque is this : He cannot successfully sue the drawer's executors on the instrument because he is not a holder for value (p. 98), and the banker's authority to pay is revoked by notice of the drawer's death. Of course, if the donor, instead of giving his own cheque, gives the cheque of a third person, which he holds, the gift is good, and the difficulty adverted to above does not arise.⁵

Transfer for value.—Even if a cheque is given for value, and even although an authority coupled with an interest is not revoked by death,⁶ it does not seem that the holder, *vis-à-vis* the bank, is in any better position. The bank no doubt would refuse to cash the cheque, although the holder had given value, but there would be no one to sue the bank for breach of contract; it is difficult to believe that the personal representatives of the deceased customer could sue in his name, but even if they could, they could recover only nominal damages.

Bankruptcy.—The authority to pay a customer's cheque is also revoked by a receiving order in bankruptcy made against him, or by notice that he has committed an available act of bankruptcy.⁷

⁹⁰ See *Re While*, [1928] W. N. 182 (presentment to a bank official in a private house held good).

¹ *Hewitt v. Kaye* (1888), L. R. 6 Eq. 275 (*donatio mortis causa*); L. R. 13 Eq. 489; cf. *Jones v. Lock* (1865), L. R. 1 Ch. 25; *Re While*, *supra*.

² *Cl. Tate v. Hilbert* (1799), 2 Ves. jun. at p. 118; 30 E. R. The bankers are justified in paying.

³ *Rolls v. Pearce* (1877), 5 Ch. D. 730.

⁴ *Re Beaumont*, [1902] 1 Ch. 889; *Bank of Baroda v. Punjab National Bank, Ltd.*, [1944] A. C. at pp. 103-5.

⁵ Cf. *Hatch v. Searles* (1854), 2 Sm. & G. at pp. 151, 155; 65 E. R.

⁶ *Clement v. Cheeseman* (1884), 27 Ch. D. 631, and p. 130.

⁷ Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 50), s. 45, and as to dealings with undischarged bankrupt, see s. 49, and see available act of bankruptcy defined by s. 167;

Garnishee order.—A banker's obligation to honour his customer's cheques ceases if he is served with a garnishee order, even though the balance to the customer's credit exceeds the amount of the judgment. If the banker honoured cheques subsequent to notice of the order, he would do so at his own risk, for it might turn out, for instance, that "a portion of the money in the banker's hands might be, without the banker's knowledge, money of which the judgment debtor was trustee. That portion could not be ordered to be paid to the judgment creditor".⁸ A garnishee order binds a solicitor's clients' account as well as his private account, and the fact that a solicitor must keep a clients' account since the Solicitors Act, 1908, with the Solicitors Accounts Rules, 1905, does not alter the position that *qua* such account the relation of the solicitor and the bank is that of creditor and debtor. The solicitor at any time may draw a cheque on such account and the bank must honour it. The bank owes the debt to the solicitor, not to his clients. Further, it is always open to a creditor to ask the Court to restrict the terms of the garnishee order *nisi* so that it does not affect the clients' account (although it must not be forgotten that the clients' account may often contain a great deal of money due to the solicitor for professional services).⁹ A garnishee order will operate even although the customer has instructed his bank to close his account and transfer the credit balance to another person, if no notice of the change of account has gone out to the new customer. The garnishee order puts a stop to the proposed transfer.¹⁰

Relations of banker and customer.—The relations of banker and customer in respect of cheques may be summarised as follows:—

(1) In the absence of special contract, the relations between a

cf. *Vernon v. Hankey* (1787), 2 T. R. 118; 100 E. R.; and *Ex p. Sharp* (1844), 3 M. D. & D. 490, under former Bankruptcy Acts.

⁸ *Rogers v. Whiteley* (1889), 23 Q. B. D. 286, C. A. (affirmed, [1892] A. C. 118, H. L.), see at p. 288, *per* Lindley, L.J. An English Court will not make a garnishee order in respect of money at the credit of a judgment debtor in a foreign branch of an English bank: see *Richardson v. Richardson* (1927), 96 L. J. P. C. 126. As to arrestment in Scotland, see Bell's Principles, 9th ed., § 808. As to effect on banker when a receiver of a customer's estate is appointed, see *Giles v. Kruger*, [1921] 3 K. B. 23, and cf. s. 48 (6) of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59).

⁹ *Plunkett and another v. Barclay's Bank* (1936), 154 L. T. 466.

¹⁰ *Rekstin v. Severo Sibirsko, etc.* (1932), 147 L. T. 281. A decision which does, it seems, conflict in logic but not in common sense or in justice with *Joachimson v. Severo Bank Corp.*, [1921] 3 K. B. 110. It is respectfully urged that the suggestions in the opinion of Lord Watson in *Rogers v. Whiteley*, [1892] A. C. 122, and of Atkin, L.J., in *Joachimson's Case* that the order *nisi* is in itself a demand is a highly artificial fiction to overcome a very real logical (but not practical) conflict. However, all fictions in law exist to destroy the otherwise inexorable application of logic. *Roberts v. Jones*, 66 L. T. 617, although now overruled, was based on unimpeachable logic, however inconvenient and unjust it may have been as a decision.

banker and his customer are those of debtor and creditor; and in addition the customer is entitled to draw cheques on the banker to the extent of the sum for which he is a creditor.¹¹ But this does not mean that always "money when paid into a bank ceases altogether to be the money of the principal", *vis-à-vis* the customer it is so, but not always *vis-à-vis* third parties. It is not correct "either in law or in business, to permit the recipient, though a banker, to impound money which his principal could not have honestly or legally retained". And so if the customer has no right to retain the money paid so, so neither has the banker.¹² But though a banking account is a debtor and creditor account there are various additional obligations. Ordinarily the debtor is bound to seek out his creditor to pay him, but if a customer wishes to close his banking account he must make an actual demand, and the Statute of Limitations runs from the date of that demand.¹³ Conversely, if a banker wishes to close a customer's account, he must give the customer reasonable notice.¹⁴ If a customer has two accounts at a bank, the banker cannot transfer funds from one account to the other without the customer's consent.¹⁵

The relations between banker and customer are confidential, and the banker must not disclose his customer's financial position or the state of his account. But this general rule is subject to certain necessary qualifications, *e.g.*, when a banker sues in respect of an overdraft, or when the interests of public justice require disclosure.¹⁶ The customer must use reasonable care in drawing his cheques, so as not to facilitate frauds on the banker, and if a cheque shows irregularity on the face of it the banker should refer to his customer before paying it.¹⁷ It is the duty of a customer to inform his banker of any forged cheque which has passed through the account, and if he fail to do so, he may be disabled from suing the banker in regard to subsequent similar forgeries.¹⁸ There is no fixed rule, but most banks decline to pay a cheque more than six months old without instructions from their customer.

¹¹ Cf. *Foley v. Hill* (1848), 2 H. L. C. 28; 9 E. R.; *Ex p. Coe* (1861), 3 De G. F. & J. 385; 45 E. R. See, too, *Re Hallett's Estate* (1880), 18 Ch. D. at pp. 727, 728, C. A.; *Re Agra Bank* (1866), 36 L. J. Ch. 151 (banker is debtor to, not trustee for, his customer): *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, C. A., explaining *Pott v. Clegg* (1847), 16 M. & W. 321; 153 E. R.

¹² *Kerrison v. Glyn, Mills & Co.* (1911), 105 L. T. 721; 17 Com. Cas. 41.

¹³ *Joachimson v. Swiss Bank Corporation*, [1921] 3 K. B. 110, C. A.; and as to super-added obligations, see at p. 127, *per Atkin, L.J.*; cf. *Atkinson v. Bradford Building Society* (1890), 25 Q. B. D. at p. 381, C. A. (deposit account).

¹⁴ *Prosperity, Ltd. v. Lloyds Bank* (1928), 39 T. L. R. 372.

¹⁵ *Greenhalgh v. Union Bank of Manchester*, [1924] 2 K. B. 158; and cf. *British-American Elevator Co. v. Bank of British North America*, [1919] A. C. 658, P. C.

¹⁶ *Tournier v. National Provincial Bank*, [1928] 1 K. B. 461, 468, C. A. Cf. *Hardy v. Veasey* (1868), L. R. 3 Ex. 107.

¹⁷ *London Joint Stock Bank v. MacMillan*, [1918] A. C. 777, see especially *per* Lords Shaw and Parmoor; and cf. *Westminster Bank v. Hilton* (1926), 43 T. L. R. 124; [1926] W. N. 892, H. L. (stopping payment of cheque).

¹⁸ *Greenwood v. Martins Bank*, [1988] A. C. 51.

(2) Subject to the exceptions noted above, where a cheque is presented for payment and dishonoured, and the banker has in his hands at the time funds to the credit of his customer sufficient to meet it, the banker is liable to his customer in damages,¹⁹ unless the requisite funds were paid in so short a time before the dishonour of the cheque that the banker could not with the exercise of reasonable diligence have ascertained the state of accounts between them.²⁰ The damages for a breach of such duty to honour a customer's cheque will be merely nominal unless the customer can prove special damage (a quite unlikely eventuality) or unless the customer is a trader²¹; presumably, however, a solicitor, an auctioneer, a stockbroker, and probably an estate agent or any kind of commercial agent would be treated in the same way as a trader.²²

(8) In the absence of special directions from the customer, it seems to be the duty of the banker to pay the customer's cheques in the order in which they are presented.²³

(4) A banker must exercise care in his choice of words he writes on a returned cheque. The words "not sufficient" are libellous, and where these words were written and there would in fact have been sufficient funds but for the negligence of the bank in failing to stop an earlier cheque, a bookmaker recovered £250 damages. The defence of privilege failed since without the mistake which the bank made there were no facts giving rise to privilege.²⁴ But to place the words, "Reason assigned—not stated", on a returned cheque is not actionable, as the words are innocuous.²⁵ In the opinion of

¹⁹ *Marzett v. Williams* (1880), 1 B. & Ad. 415; 109 E. R.; *Whitaker v. Bank of England* (1885), 1 C. M. & R. 744; 149 E. R.; *Gray v. Johnston* (1868), L. R. 3 H. L. 1, see at p. 14, *per* Lord Westbury; but see *per* Lord Cairns and *Bodenham v. Hoskyns* (1852), 2 De G. M. & G. 908; 42 E. R.; cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 351, Ex. Ch. In *Kinlan v. Ulster Bank*, [1928] Ir. R. 171, it was held that only nominal damages were due where the cheque of which payment was refused was drawn payable to self and was presented by the drawer. As to the measure of damages, see p. 178. As to banker claiming a lien, see *Agra Bank v. Hoffman* (1865), 34 L. J. Ch. 285. As to withdrawal of money paid into a bank by a principal who has given an agent authority to draw on it, see *Société Coloniale v. London and Brazilian Bank* (1911), 17 Com. Cas. 1, C. A. As to recovery by a third party of money paid in by mistake to a customer's overdrawn account, see *Kerrison v. Glyn, Mills & Co* (1912), 81 L. J. K. B. 465, H. L.; 17 Com. Cas. 41, H. L.

²⁰ *Whitaker v. Bank of England* (1885), 1 C. M. & R. at pp. 749, 750; 149 E. R., Paik, B.; cf. *Bransby v. East London Bank* (1866), 14 L. T. 403.

²¹ *Gibbons v. Westminster Bank*, [1939] 3 A. E. R. 577. Forty shillings only given as damages by Lawrence, J., in favour of a woman plaintiff who was not a trader, in place of the £50 awarded by the jury.

²² Cf. *Davidson v. Barclays Bank*, [1940] 1 A. E. R. 316, where Halbery, J., awarded £250 damages for libel on a cheque returned with words "not sufficient" to a credit bookmaker.

²³ *Kilsby v. Williams* (1892), 5 B. & Ald. 819; 106 E. R.; cf. *Boyd v. Emmerson* (1894), 2 A. & E. 184, at p. 202; 111 E. R.

²⁴ *Davidson v. Barclays Bank*, [1940] 1 A. E. R. 316.

²⁵ *Frost v. London J. S. Bank, Ltd.*, 22 T. L. R. 760, C. A.

Mr. Clement Gatley²⁶ the letters "R/D" or the letters "R/A" (on a bill) are equally harmless, but there is some considerable authority to the contrary, and the wise banker will stick to the judicially beaten path, "Reason assigned—not stated", unless it be something obviously innocuous, such as "signature indistinct" or the like.

(5) As regards banks having several branches, where a customer has an account at one branch, the other branches at which he has no account are not bound to honour his cheques²⁷; but where a customer has accounts at two or more branches the bank is entitled to combine such accounts against him.²⁸ Where an account has in fact been transferred from one bank in territory subsequently occupied by the enemy to a bank in England, the latter becomes accountable to the customer and is not merely an agent of the first bank and therefor is not under a duty to "freeze" the customer's funds and securities.^{28a}

The combined accounts must be kept in the same right, e.g., a personal and a trust account cannot be combined. See the whole status of branch banks in regard to bills discussed by the Privy Council.²⁹

Overdraft.—In the absence of special agreement, express or implied, founded on consideration, a banker is of course under no obligation to let a customer overdraw.³⁰ "Overdrawing a banking account is borrowing money."³¹

Property in paid cheque.—A cheque on payment becomes the property of the drawer,³² but the banker who pays it is entitled to keep it as a voucher until his account with his customer is settled.³³

²⁶ Label and Slander, 8rd ed., p. 28.

²⁷ *Woodland v. Fear* (1867), 7 E. & B. 519; 119 E. R. 80, too, a customer having a balance at one branch, cannot withdraw it on demand at another branch, though at his own cost he may apply to have it transferred: *Clare v. Dreadner Bank*, [1915] 2 K. B. 576, distinguishing *Leader v. Disconto Gesellschaft* (1914), 31 T. L. R. 88; cf. also *Leete v. Disconto Gesellschaft*, [1916] W. N. at p. 13; 85 L. J. K. B. 281. Notice to stop a cheque at one branch is not notice to another branch: *London and South Western Bank v. Buzard* (1919), 35 T. L. R. 142.

²⁸ *Garnett v. M'Kewan* (1872), L. R. 8 Ex. 10, a fortiori, in the case of two or more accounts at the same branch: cf. *Plunkett and another v. Barclays Bank* (1936), 154 L. T. 465; and *Greenhalgh v. Union Bk. of Manchester*, [1924] 2 K. B. 158.

^{28a} *Isaacs v. Barclays Bank and another*, [1943] 2 A. E. R. 682.

²⁹ *Prince v. Oriental Bank* (1878), 3 App. Cas. 825.

³⁰ *Cumming v. Shand* (1860), 29 L. J. Ex. at p. 182. As to implied agreement, see *Armfield v. London and Westminster Bank* (1883), 1 O. & E. 170; as to presumption, see *Ritohie v. Clydesdale Bank* (1886), 13 Sess. Cas. 114. As to the general duty of a bank not to disclose the state of a customer's account, except for good reasons, see p. 251. As to consideration to support a promise to honour an overdraft, see *Fleming v. Bank of New Zealand*, [1900] A. C. 577, P. C.

³¹ *Lindley on Partnership*, 9th ed., p. 191.

³² *R. v. Watts* (1850), 2 Den. C. C. 15; 169 E. R.

³³ Cf. *Charles v. Blackwell* (1877), 2 C. P. D. at p. 162, C. A. But when a banker pays a bill accepted payable at his bank, the practice is to return the cancelled bill to the customer on the following day.

Pass-book.—Entries made in customer's pass-book are *prima facie* evidence against the bank.³⁴

As the pass-book is made up by the banker it does not constitute a settled account. Hence if the drawer's signature to a cheque is forged the mere fact that he omits to examine his pass-book when returned to him, and does not discover that he has been debited with the amount, does not preclude him from recovering the sum so debited from his banker.³⁵ On the other hand, the banker may be bound by a mistaken entry. For example, a customer's balance is £60, but it is entered as £70 by wrongly crediting an item of £10. If the customer in good faith draws a cheque for £65, and the bank dishonours it, the customer is entitled to substantial damages.³⁶

Lunatic customer.—It seems on principle that the duty of a banker to pay his customer's cheques, and probably also his authority to pay them, may be determined by notice that the customer has become a lunatic.³⁷

Duty as to bills.—When a customer accepts a bill payable at his bankers, it is an authority to the banker to pay it³⁸; but the banker is not bound to do so in the absence of special arrangement.³⁹ In the case of a cheque he is protected against the consequences of a forged indorsement (s. 60); in the case of a bill he is not (s. 24). In the absence of special agreement a banker is clearly under no obligation to accept his customer's bills (p. 177), or, it seems, bound to pay a bill, other than a cheque, drawn on him by a customer (p. 177); and it may be noted that a post-dated cheque, known to be such, is for some purposes regarded as a bill of exchange payable

³⁴ *Commercial Bank v. Rhind* (1848), 1 Macq. H. L. 848; *Cowper's Trustees v. National Bank of Scotland* (1889), 16 Sess. Cas. 412; *Gaden v. Newfoundland Savings Bank*, [1899] A. C. at p. 288, P. C. As to appropriation of payment by entries in bank books not communicated to customer, see *Simson v. Ingham* (1923), 2 B. & C. 65; 107 E. R., and as to such entries in pass-book, see at p. 73. See, too, *Hooper v. Keay* (1875), L. R. 1 Q. B. 178. In *British and North European Bank v. Zalsstein*, [1927] 2 K. B. 92, a customer was held not entitled to merely notional credits wrongfully entered by an official of the bank and offset by corresponding debits. As to facts which in the United States may preclude a customer from disputing errors in his pass-book, see *Leather Manufacturers' Bank v. Morgan* (1886), 117 U. S. Rep. 96 (Sup. Court of U. S.).

³⁵ *Walker v. Manchester and Liverpool District Bank* (1913), 108 L. T. 728, following *Kepitigalla Rubber Estates Co. v. National Bank of India*, [1909] 2 K. B. 1010.

³⁶ *Holland v. Manchester and Liverpool District Bank* (1909), 14 Com. Cas. 241, i.e., in the case of a trader, see p. 252.

³⁷ Cf. *Drew v. Nunn* (1879), 4 Q. B. D. 661, C. A. (agency); *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. 27, C. A. (continuing guarantee).

³⁸ *Kymer v. Laurie* (1849), 18 L. J. Q. B. 218. And demand for payment of a bill over the counter of a bank is not necessarily a circumstance which should put the bank upon inquiry: *Auhteroni & Co. v. Midland Bank, Ltd.* (1928), 97 L. J. K. B. 626.

³⁹ Cf. *Roberts v. Tucker* (1851), 16 Q. B. at 579; 117 E. R.; *Bank of England v. Vagliano*, [1891] A. C. at p. 187, H. L. *Aliter*, perhaps, under § 147 of the New York Negotiable Instruments Law.

after date.⁴⁰ If a banker is authorised by his customer to accept bills for him against "clean bills of lading", the banker is not responsible for the genuineness of the bills of lading if they appear to be in order.⁴¹

Moratoria.—In consequence of the financial disturbance caused by the outbreak of war in 1914, the Postponement of Payments Act, 1914 (4 & 5 Geo. 5, c. 11), was passed to authorise the issue of Royal Proclamations, postponing the payment of bills and notes, and other obligations to such extent and subject to such conditions as the proclamation might specify. In pursuance of this Act the proclamations of August 6, September 4, and September 30 were issued, and under them, on certain terms, the payment of debts was postponed till November 4.⁴² As the result customers were relieved in general from paying their debts, but were debarred from drawing on their pre-moratorium balances during the currency of the moratorium. Bankers, of course, met their customers' convenience so far as they prudently could do so. The financial disturbance was so general that most other countries passed moratory laws. As to the recognition of foreign moratory laws in this country, see notes to s. 46, and s. 72 (5). On the outbreak of war in September, 1939, there was no need for a moratorium because the Courts (Emergency Powers) Act, 1939 (2 & 3 Geo. 6, c. 67), which came into force on the second day of September, 1939 (by Order in Council), prohibited a judgment creditor from proceeding to execution on the judgment or order of any Court except by the leave of the appropriate Court, and further prohibited any person from taking possession of any property or from realising any security or forfeiture of deposit by way of remedy available to him in that form without leave of the appropriate Court. And the Court was given a discretion to refuse such leave in all cases where the person's inability to satisfy the order or judgment or meet his obligation arose from circumstances directly or indirectly attributable to the war.

Bank's obligation of disclosure to a prospective guarantor.—The bank is under no obligation to make a complete disclosure of all facts that might influence a person proposing to guarantee a customer's overdraft.^{42a}

⁴⁰ *Forster v. Mackreth* (1867), L. R. 2 Ex. 168; cf. *Emmanuel v. Roberts* (1868), 9 B. & S. 121. *Qu.* as to the banker's obligation since the objection to post-dated cheques was removed by the Stamp Act, 1870.

⁴¹ *Ulster Bank v. Synnot* (1871), 5 Ir. R. Ch. 595; cf. *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623, C. A.; 23 Com. Cas. 400, C. A.

⁴² Cf. Manual of Emergency Legislation, *tit.* Postponement of Payments; *Allen v. L. G. and Westminster Bank* (1915), 84 L. J. K. B. 1286 (overdraft); *Flash v. London and S. W. Bank* (1915), 81 T. L. R. 284 (dishonour of cheque); *J. and P. Coats & Co., Ltd. v. Disconto Gesellschaft* (1915), 81 T. L. R. 446 (interest on deposit notes).

^{42a} *Cooper v. National Provincial Bank* (1945), 173 L. T. 368.

Crossed Cheques

General and special crossings defined.

76. (1) Where a cheque bears across its face an addition of—

- (a) The words “and company” or any abbreviation thereof between two parallel transverse lines, either with or without the words “not negotiable”; or
- (b) Two parallel transverse lines simply, either with or without the words “not negotiable”;

that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable”, that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

By the Bills of Exchange Act (1882) Amendment Act, 1932 (22 & 23 Geo. 5, c. 44), ss. 76 to 82 relating to crossed cheques shall apply to a banker's draft as if it were a cheque, and banker's draft is therein defined as a draft payable on demand drawn by or on behalf of a bank upon itself, whether payable at the head office or some other office of the bank.⁴³

By s. 2 “banker” includes a body of persons, whether incorporated or not, who carry on the business of banking. See notes thereto.

The origin of crossing cheques was explained by Parke, B.,⁴⁴ and the common law effect of a crossing commented on by Lord Cairns.⁴⁵ The first statute recognising crossings was 19 & 20 Vict. c. 25. This enactment was supplemented by 21 & 22 Vict. c. 79, in consequence of a decision to the effect that the crossing was not an integral part of the cheque, and that its fraudulent obliteration was not a forgery.⁴⁶ Then came the case of *Smith v. Union Bank*.⁴⁷ A cheque payable to bearer, and crossed to the London and County Bank, was stolen. It got into the hands of a holder in due course, who obtained payment through the London and Westminster Bank, notwithstanding the

⁴³ See p. 389.

⁴⁴ *Bellamy v. Majoribanks* (1852), 7 Exch. 889, at p. 402; 155 E. R. The practice originated in the Clearing House, and was afterwards adopted outside.

⁴⁵ *Smith v. Union Bank* (1875), 1 Q. B. D. at p. 89, C. A. It operated as a mere caution to the banker.

⁴⁶ *Simmonds v. Taylor* (1858), 27 L. J. C. P. 248.

⁴⁷ (1875), 1 Q. B. D. 81, C. A.

crossing. The Court held that the true owner had no remedy against the paying bankers because the negotiability of the cheque was not affected by the crossing.⁴⁸ To meet this difficulty the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81) was passed. That enactment introduced the "not negotiable" crossing, and gave a remedy to the true owner of a crossed cheque if it was paid contrary to the crossing (see now s. 79 (2) and s. 81). It repealed the previous statutes. The present Act repeals the Act of 1876, but, by ss. 76—82, reproduces its provisions with some slight modifications.

By s. 95 the provisions of the Act as to crossed cheques apply to dividend warrants; and, by the Revenue Act, 1888 (46 & 47 Vict. c. 55, s. 17), p. 844, they are further applied to "any document issued by a customer of any banker, and intended to enable any person to obtain payment from such banker of the sum mentioned in such document"; for the purposes of this section the Paymaster-General and, in Scotland, the Lord Treasurer's Remembrancer are deemed bankers; for banker's drafts, see p. 256.

The English system of crossing cheques does not appear to have been adopted in the United States, and has only recently been adopted in some of the continental States; see, for instance, the French law of 1911, and *Bouteron's Le Cheque*, p. 88.

Crossing by drawer or after issue.

77. (1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable".

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.⁴⁹

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

Sub-s. 1 is new, but declaratory. S. 4 of the Act of 1876 in terms

⁴⁸ *Ibid.*

⁴⁹ The words "to another banker for collection" have been substituted for the words "to another banker, his agent for collection".

only authorised the "lawful holder" to cross a cheque. See now "holder" defined by s. 2. It includes an agent for collection.⁵⁰

Sub-s. 6 is new. It may protect the banker from possible frauds by his clerks. It is to be noted that only a drawer or holder can cross a cheque under this section except for the very limited rights of specially crossing or converting into a special crossing given to banks by sub-ss. 5 and 6. Consequently where an uncrossed cheque is paid into a bank for collection and the banker crosses it, the cheque does not thereby become a crossed cheque within the meaning of s. 82.⁵¹ As to the effect of crossing by a stranger, see *Paget on Banking* (4th ed.), p. 156.

Crossing a material part of cheque.

78. A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing.

For the effect of material alterations generally, see s. 64. It is forgery fraudulently to alter or obliterate a crossing: see s. 1 of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27).

The drawer of a cheque sometimes strikes out a crossing at the request of the payee, and writes "Pay cash" on it. The Act does not sanction this practice, but it is difficult to see who in such case could have an effective cause of complaint. In an unreported case it was held that where the indorser of a cheque crossed it, and at the request of the indorsee altered the crossing, the indorser could not set up that the cheque was avoided by the alteration. See also note to s. 76. Where a cheque was paid in to the E. Bank for collection, and they indorsed it specially to F. & Co., their clearing-house bankers, adding the words "Account E. Bank", it was held that this was not an addition to the crossing, but only a direction to the receiving bank as to how the money was to be dealt with after receipt.⁵²

Duties of banker as to crossed cheque.

79. (1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

⁵⁰ *Akrokers Mines v. Economic Bank*, [1904] 2 K. B. at p. 472; 9 Com. Cas. at p. 288, *Sutlers v. Briggs*, [1921] A. C. 1, H. L.

⁵¹ *Capital and Counties Bank v. Gordon*, [1903] A. C. 240.

⁵² *Akrokers Mines v. Economic Bank*, [1904] 2 K. B. at p. 472, 9 Com. Cas. at p. 288. As to the effect of the marking "a/c payee", see p. 265.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same,⁵³ or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

When a bank receives a crossed cheque on behalf of a customer which is drawn on itself by another customer, the bank must be treated as paying the crossed cheque to a bank although it only "pays itself and makes entries in the two accounts of the customers". In strictest analysis such transaction does involve paying the customer, as no person can pay himself.⁵⁴

This section reproduces ss. 8, 10, and 11 of the Act of 1876. As there is no privity between holder and drawee, a banker incurs no liability to the *holder* by refusing to pay the cheque, crossed or uncrossed. His liability, if any, is only to his customer, the drawer.

In a case before the Act of 1876 a crossed cheque payable to order was stolen from the payee. His indorsement was forged, and the cheque was paid in contravention of the crossing to a person who gave value in good faith. The drawee gave the payee another cheque. On these facts it was held: (1) that the banker had no right to debit the drawer's account with the cheque; (2) that the payee who lost the cheque might have recovered the amount from

⁵³ If a cheque is paid into a bank, and the bank gives its own cheque in exchange, the cheque is paid within the meaning of this section: *Meyer & Co., Ltd. v. Sze Hai Tong Banking Co.*, [1918] A. C. 847, P. C.

⁵⁴ *Carpenters Co. v. British Mutual, etc.*, [1938] 1 K. B. 511. See especially the judgment of MacKinnon, L.J.

the person who received the money for it; but (8) that the drawer, having allowed his account to be debited with the cheque, might himself recover the amount from the person who got cash for it.⁵⁵

The Act does not appear to affect this decision, but it gives an additional remedy against the bankers to the true owner, who, in the case referred to, would have been the payee. If the cheque is payable to bearer, or has been indorsed in blank by the payee before it was stolen, and has got into the hands of a *bona fide* holder for value, there is no remedy⁵⁶ in spite of a payment in disregard of the crossing, unless the cheque was crossed "not negotiable".

Protection to banker and drawer where cheque is crossed.

80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

This reproduces s. 9 of the Act of 1876. If the cheque were payable to order, and the indorsement has been forged, the drawer, or, as the case may be, the payee, can recover the amount from the person who received payment of the cheque, if he can find him.⁵⁷ A bank which pays on an improper indorsement cannot be heard to say it paid without negligence.⁵⁸

Effect of "not negotiable" crossing on holder.

81. Where a person takes a crossed cheque which bears on it the words "not negotiable", he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.⁵⁹

⁵⁵ *Bobbett v. Pinkett* (1876), 1 Ex. D. 368, at p. 372. Cf. *Penmount Estates, Ltd. v. Nat. Prop. Bank* (1945), 178 L. T. 344; *Wilson and Messon v. Pickering*, C. A., Law Jo., March 1, 1946, at p. 108.

⁵⁶ *Smith v. Union Bank* (1875), 1 Q. B. D. 81, C. A. It seems clear that the holder in due course is in such a case the true owner of the cheque and since payment is made to him or someone claiming through him he cannot complain of a payment violating the terms of the crossing. Cf. *Faet on Banking*, 4th ed., p. 157.

⁵⁷ *Ogden v. Benas* (1874), L. R. 9 Q. P. 518; cf. *Patent Safety Gun Co. v. Wilson* (1880), 49 L. J. C. P. 718, C. A.

⁵⁸ See *Slingsby v. District Bank*, [1902] 1 K. B. 544.

⁵⁹ Cf. the wording of s. 36 (2), as to overdue bills.

The words "not negotiable" have only the specialised and restricted meaning attached in this section when they form part of the crossing of a cheque. When they appeared across the face of a bill of exchange which was expressed to be payable to the payee only and there was further evidence that the parties did not intend the bill to be negotiated, the Court of Appeal refused to construe them as merely destroying negotiability, leaving transferability unaffected. It was held that the words prohibited transfer within the terms of s. 8 (1), and that the indorsee could not sue upon it.⁶⁰

This reproduces the first part of s. 12 of the Act of 1876. A cheque crossed "not negotiable" is still transferable, but its negotiable quality is limited. It is put on much the same footing as an overdue bill. A holder who has a good title can still transfer it, and the transferee is entitled to receive payment; but where the title of the transferor is defective a subsequent holder for value is deprived of the protection ordinarily afforded to a holder in due course. Suppose a cheque payable to bearer and crossed "not negotiable" is stolen. The thief gets a tradesman to cash it for him, and the tradesman gets the cheque paid on presentment through a banker. The banker who pays and the banker who receives the money for the tradesman are protected,⁶¹ but the tradesman would be liable to refund the money to the true owner. Assuming payment of such a cheque to have been stopped, such a tradesman could not sue the drawer. Where a cheque crossed "not negotiable" was drawn in favour of a firm, and one of the partners in fraud of his co-partner indorsed the cheque to the defendant, who cashed it, it was held that the other partner who, under the terms of the partnership agreement was entitled to the cheque, could recover the amount from the defendant.⁶²

Protection to collecting banker.

82. Where a banker in good faith and without negligence⁶³ receives payment for a customer of a cheque crossed

⁶⁰ *Hiberman Bank v. Gysin and Hanson*, [1889] 1 K. B. 483, upholding *Lewis, J.* They may well have the same meaning as attached by the section when they appear on the face of a postal order. It is difficult to believe that on a postal order they mean "not transferable".

⁶¹ Ss. 80 and 82.

⁶² *Fisher v. Roberts* (1890), 116 T. L. R. p. 354, C. A. No problem of ostensible authority arose since the defendant had no knowledge of any partnership. Presumably, if the dishonest partner had purported to be acting as the agent of the partnership, the defendant would not have been liable to refund the proceeds to the plaintiff in absence of any knowledge of the fact that the former had no authority. See the section incidentally discussed in *National Bank v. Silke*, [1891] 1 Q. B. 485, C. A.; and by Lord Brampton in *G. W. Ry. v. London and County Bank*, [1901] A. C. 414, H. L.

⁶³ See *Hannan's Lake View v. Armstrong & Co.* (1900), 5 Com. Cas. 188; *Basins v. London and South Western Bank*, [1900] 1 Q. B. 270, at p. 272; *Ross v. L. C. and Westminster Bank*, [1919] 1 K. B. 678 (cheque payable to a public

generally or specially to himself,"⁶⁴ and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

This section protects the collecting banker only when he is dealing with a cheque, and not when dealing with a bill which is not a cheque.⁶⁵ For "customer", see p. 264.

A banker who forwards forged receipts and false certificates and collects thereon monthly a pension does not by such actions make any implied representations or warrant that the certificates are true.⁶⁶

The onus is on the bank to prove that it acted in good faith and without negligence.⁶⁷ "The standard by which the absence or otherwise of negligence is to be determined must, in my opinion, be ascertained by reference to the practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud."⁶⁸

"The question in every case is not whether the bank require a particular standard of conduct, but whether the particular acts which are done are enough to discharge the onus which is upon the bank either in respect of their own customer or in respect of some other customer." "As to whether or not the bank or its officers exercised due care in any particular case, that must depend upon the facts of the particular case."⁶⁹

"It is difficult to enunciate any principle which is applicable to the infinite variety of circumstances in which such a question might arise. There are obviously various considerations: the name of the payee, the form of the indorsement; the circumstances of the customer himself . . ." [who presents the cheque]. ". . . It is true that, in the light of after events, the explanations given . . . may sound improbable to anyone in a suspicious frame of mind; but in my opinion the officials of the bank, doing their duty under s. 82, have not to be abnormally suspicious. Moneys must be paid out, among a multi-

department, indorsed and paid in to a private account). For a suggested test of negligence, which is a question of fact, see *Commissioners of Taxation v. English, Scottish and Australian Bank*, [1920] A. C. 688, P. C.; *Hampstead Guardians v. Barclays Bank* (1928), 89 T. L. R. 229 (no title in customer), *Savory v. Lloyds Bank* (1981), 48 T. L. R. 80.

⁶⁴ It must be crossed before it reaches his hands: *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, H. L.

⁶⁵ *Arnold v. Cheque Bank* (1876), 1 Q. B. D. 576.

⁶⁶ *Gowers v. Lloyds and another*, [1938] 1 A. E. R. 766.

⁶⁷ E.g., per Lord Wright in *Lloyds Bank v. Savory*, [1938] A. C. 201. A banker does not inevitably establish absence of negligence by proving that the acts alleged to be negligence are within the ordinary practice of bankers and then alleging that a bank is not negligent if it takes all precautions usually taken by bankers.

⁶⁸ *Ibid.* per Lord Warrington.

⁶⁹ *Motor Traders Corp. v. Midland Bank*, [1987] 4 A. E. R. 90, at pp. 96 and 94.

plicity of other transactions, with reasonable dispatch. As it turns out, there are a good many questions on which a lawyer, who is trained very differently from a bank clerk, would have had in mind to cross-examine" [the customer]. "But I have come to the conclusion that the bank did use reasonable care."^{69a}

ILLUSTRATIONS

1. A thief steals a crossed cheque payable to order, and inserts his own name in the place of the indorsee. He then takes it to a Paris bank (where he has no account) to collect for him, and they collect it through their London agents. The indorsee can recover the amount from the Paris bank.⁷⁰

2. C, having obtained by fraud a cheque which is crossed "& Co, not negotiable", takes it to a bank, who cash it for him. He has no account at that bank, but for many years the bank has been in the habit of cashing cheques for him. C is not a customer of the bank, and the bank is not protected by the section in obtaining payment of the cheque.⁷¹

3. A bank carries on business in London and Paris. A crossed cheque payable to order is drawn on the London branch in favour of C in Paris. It is stolen from him, and his indorsement is forged. In France the crossing of cheques is not recognised, and the Paris branch cash the cheque for F, who appears to be the last indorsee, though he has no account there, and remit it to London. C, the true owner, can maintain an action against the bank for conversion.⁷²

4. A draws a crossed cheque, marked "a/c payee only", in favour of C, and puts it in the pillar-box. It is stolen therefrom, and gets into the hands of X, who personates C, forges his signature, and opens an account with a banker by means of the stolen cheque. The banker makes no inquiry as to X's position or character. If the banker collects the cheque for X's account he is not protected.⁷³

5. A, who is the manager of an insurance broker's business, has authority to draw cheques "per pro." for the purposes of that business. He fraudulently draws a series of cheques "per pro." and pays them into his own banking account. If his banker collects them without inquiry he is guilty of negligence.⁷⁴

6. Crossed cheque drawn payable to "T. C and others, or bearer"; "a/c payee". T. C. and others are trustees of a fund. The cheque is sent to the solicitor to the trust, who fraudulently pays it into his own account at the X bank, where the trustees have no account. If the X bank collects the cheque it is guilty of negligence.⁷⁵

7. X turns his business into a one-man company, and issues debentures. X, who is the sole managing director, pays into his own account cheques payable to

^{69a} *Per MacKinnon, L.J., Penmount Estates v. National Prov. Bank* (1945), 173 L. T. at p. 346.

⁷⁰ *Kleinwort v. Comptoir d'Escompte*, [1894] 2 Q. B. 156, followed *Lacave v. Crédit Lyonnais*, *infra*, *Matthews v. Brown* (1894), 68 L. J. Q. B. 494.

⁷¹ *Great Western Ry. v. London and County Bank*, [1901] A. C. 414, H. L.

⁷² *Lacave v. Crédit Lyonnais*, [1897] 1 Q. B. 148. In 1911 a law was passed in France authorising the crossing of cheques.

⁷³ *Ladbroke & Co. v. Todd* (1914), 19 Com. Cas. 256; approved, *Lloyds Bank v. Savory & Co.*, [1933] A. C. 201.

⁷⁴ *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 850, at p. 868, C. A. (But on the facts subsequent to this transaction it was held that the employer had ratified the action of the manager.) See *Lloyds Bank v. Savory*, [1933] A. C. 201, where Lord Wright said of this case: "I find it difficult to appreciate on what principle that case was decided in regard to this point: it can only be justified, if at all, on its special facts". Cf. *Lloyds Bank v. Chartered Bank of India, Australia and China* (1928), 97 L. J. K. B. 609 (cheques drawn by bank manager, with authority to draw, paid to his private account in defendant bank and proceeds quickly drawn out and paid to stockbrokers: defendant bank made no inquiry: negligence). Cf. *Corporation Agencies, Ltd. v. Home Bank*, [1927] A. C. 818, where there was nothing to show the collecting bank the fraud by the director, who was abusing his authority to sign cheques.

⁷⁵ *House Property Co. v. London, etc., Bank* (1916), 84 L. J. K. B. 1846.

the company. The bank, without inquiry, collects these cheques for X. The company fails and X dies. The bank has been negligent.⁷⁶

8. A draws a cheque, marked "account payee only", payable to X in Germany. He sends this to S., his agent in Germany, to hand to X. S. forges X's indorsement and, adding his own name, pays the cheque into his own bank in Dresden. The Dresden bank employs the W Bank in London to collect. The W Bank has "received payment" for a "customer", and is protected by the section.⁷⁷

9. The plaintiffs, a firm of stockbrokers, had two dishonest clerks, Perkins and Smith, who stole cheques made payable to various jobbers or bearers. The clerks availed themselves of the facility granted by all bankers now-a-days to pay in cheques at any branch of their bank. Perkins paid in at a city branch of the defendants for transmission to his account with a country branch of the defendants. Smith paid in at the defendants' head office for transmission to their country branch, where Mrs. Smith had an account. Neither country branch ever saw the cheques or received any particulars of them other than their amount. The defendants were held negligent (*inter alia*) in failing to inquire the name of Perkins's employers when they knew that he was a stockbroker's clerk, and to make adequate inquiries when opening and later accepting a transfer of Mrs. Smith's account.⁷⁸

10. A city corporation which maintained a nursing home sought to recover the proceeds of crossed cheques stolen by their dishonest clerk, who was also the secretary of the home. He paid these cheques into his account with the defendants, who were also the bankers of the corporation. The bank was negligent in not inquiring how came it that the clerk was paying his employers' cheques into his own account. Therefore, being liable under s. 82, the bank could not extend the protection granted it as paying bank by s. 60 to cover its duties as a collecting bank under s. 82.⁷⁹

11. When a collecting bank is put upon inquiry as to the origin and history of a "third party cheque", paid in by its customer, the nature of the inquiries and the reasonableness of accepting the customer's own uncorroborated explanation depend largely on the banking record of the customer. And so, where a customer had a poor record with many cheques presented three times before payment, the defendants' cashier should have observed the rules which the bank set him in such a case, and should have referred the cheque to the manager, who should have fully satisfied himself that the customer was entitled to deal with the cheque in the way he was doing by paying into his own account.⁸⁰

12. A solicitor who held his client's power of attorney, drew cheques expressly as his client's agent in favour of himself and paid them into his firm's banking account in fraud of his principal. Since the defendant collecting bank knew that the money (the proceeds of the cheques) was not the money of their customer but belonged to his principal and that the money was being used to liquidate their customer's private debts, the principal (the true owner of the cheques and their proceeds) could successfully sue the bank in conversion, and it was immaterial that there was a ratification clause in the power of attorney.⁸¹

18. A solicitor, who there was reason to believe was not very reputable, paid into his client's account with the defendant bank a cheque (crossed generally and "not negotiable") payable to the plaintiffs whose indorsement had been forged. It was held that the bank had not been negligent, although the explanations given to the bank officials "in the light of after events sounded improbable to anyone in a suspicious frame of mind".^{81a} It is to be noted that the bank did not dispute negligence in regard to similar cheques crossed "a/c payee only".

⁷⁶ *Underwood v. Bank of Liverpool*, [1924] 1 K. B. 775, C. A.; and cf. *Alexander Stewart & Son v. Westminster Bank*, [1926] W. N. 271, C. A.

⁷⁷ *Importers Company, Ltd. v. Westminster Bank* (1927), 96 L. J. K. B. 919.

⁷⁸ *Lloyds Bank v. Savory & Co.*, [1988] A. C. 201.

⁷⁹ *Carpenters Co. v. British Mutual Banking Co.*, [1988] 1 K. B. 511.

⁸⁰ *Motor Traders' Guarantee Corp. v. Midland Bank* (1937), 157 L. T. 478.

⁸¹ *Midland Bank v. Reckitt*, [1983] A. C. 1, applying *Reckitt v. Barnett*, [1929] A. C. 176.

^{81a} *Penmount Estates v. Nat. Prov. Bank* (1945), 178 L. T. 844, per MacKinnon, L.J., sitting as Judge of first instance; see particularly his judgment, 3rd para., p. 846.

S. 82 reproduces the proviso to s. 12 of the Act of 1876 (cheques crossed "not negotiable"⁸²). It is amended or explained by the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), p. 358.

Customer.—A person is a customer so soon as the bank opens an account on which he can draw.⁸³ One bank may be another's customer, as when it employs the other to clear its cheques.⁸⁴

Where a customer pays in to his banker the cheque of a third party, the usual practice is for the banker at once to credit the customer's account with the amount of the cheque, and then, if the cheque is dishonoured, to debit his account with the amount thereof. But, so soon as the banker credits his customer's account, he becomes a holder for value of the cheque, whether crossed or not, and, that being so, the House of Lords held that he was receiving payment of the cheque on his own account and not on behalf of the customer, and, therefore, was not protected by s. 82 if his customer's title was defective.⁸⁵ As a result, the only safe course for the banker was to put every cheque paid in by a customer to a suspense account until it was cleared. The Bills of Exchange (Crossed Cheques) Act, 1906, p. 358, now protects the banker notwithstanding that he credits his customer's account with the crossed cheque before he receives payment. Nevertheless, when a bank credits a customer's account with the amount of a cheque before clearance, it is still a question of fact whether the bank holds the cheque as a holder for value or as an agent for collection only.⁸⁶

The mere crossing "not negotiable" does not put the collecting banker on inquiry as to the title of the holder.⁸⁷

Per pro. cheques.—S. 25 (procuration signatures) relates only to liabilities on the instrument, and does not apply to collecting bankers; but in determining whether the banker has been guilty of negligence the fact that a cheque was drawn or indorsed "per pro." is always an element to be taken into consideration.⁸⁸

A/c payee.—Of recent years the practice has sprung up of marking cheques with the words "account payee". This is not an addition

⁸² This gives effect to *Mathiessen v. London and County Bank* (1879), 5 C. P. D. 7, where it was argued that the proviso only applied to cheques crossed "not negotiable", but it was held to apply to all crossed cheques.

⁸³ *Ladbroke v. Todd* (1914), 19 Com. Cas. 256, at p. 261; cf. *Great Western Ry. v. London and County Bank*, [1901] A. C. 414, H. L.

⁸⁴ *Importers Co., Ltd. v. Westminster Bank* (1927), 98 L. J. K. B. 919.

⁸⁵ *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, H. L.

⁸⁶ *Re Farrow's Bank*, [1928] 1 Ch. 41, 48, C. A. (cheque credited, but customer not authorised to draw against it before clearance).

⁸⁷ *Crumplin v. London Joint Stock Bank* (1918), 19 Com. Cas. 69.

⁸⁸ *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, 368, C. A.; cf. *Bissell v. Fow & Co.* (1884), 51 L. T. 683; *Crumplin v. London Joint Stock Bank* (1918), 19 Com. Cas. 69; as to paying banker, see *Charles v. Blackwell* (1877), 2 C. P. D. 161, C. A.

to the crossing, but a direction to the collecting banker that the proceeds of the cheque are to be placed to the credit of the payee specified in the cheque.⁸⁹ It has been held (1) that the marking "a/c payee" does not restrict the negotiability of the cheque,⁹⁰ and (2) that a cheque drawn payable to "T. C. and others or bearer", "a/c payee" is not payable to bearer, but should be credited to the account of "T. C. and others" (Illustration 6). (8) Where a cheque is marked "a/c payee only, not negotiable" and the payee indorses it to his banker for collection, the banker is a holder and indorsee of the cheque.⁹¹ If, then, the collecting banker pays a cheque marked "a/c payee" otherwise than to that account, he does so at his own risk^{91a}; presumably if he does not keep the payee's account he may refuse to handle the cheque. It is said that uncrossed cheques are sometimes marked "a/c payee"; however, the liability of the paying banker in such a case has not been decided; but it is submitted that the essence of the matter lies not in the fact that the cheque is crossed but that it has the words "a/c payee" written across its face: it is these words, and not the crossing, which should put the bank on inquiry when it appears that the proceeds of the cheque are going otherwise than to the payee or his banker. We await further judicial consideration of the status of cheques marked "a/c payee", in the way in which the Judicial Committee of the Privy Council recently explored the implications of a "certified" cheque.⁹² Nevertheless, the position seems reasonably clear: the words do not constitute an imperative direction to the paying bank or restrict the further negotiability or transferability of the cheque; but they do put every holder and the collecting and paying banks upon inquiry.

In countries where German law applies crossing is not recognised, but cheques may be marked "*nur zur Verrechnung*".

⁸⁹ *Morison v. London County and Westminster Bank*, [1914] 3 K. B. at p. 378, C. A. A bank which is merely clearing a cheque marked "a/c payee only" for another bank seems to be in order in so doing; but there must be indorsements on the cheque consistent with the bank which is sending it forward being able to hold the cheque in compliance with the direction: see *Importers Co., Ltd. v. Westminster Bank* (1927), 96 L. J. K. B. 919.

⁹⁰ *National Bank v. Sills*, [1891] 1 Q. B. 435, C. A. The judgments are largely obiter; the case decided that when a cheque has been duly credited to the payee the banker has the ordinary rights of a banker who has credited his customer's account with the amount of a cheque.

⁹¹ *Sutlers v. Briggs*, [1921] A. C. 1, H. L. (decided on the Gaming Act, 1885).

^{91a} See Illustration 13, p. 264, and n. 81a.

⁹² *Bank of Baroda v. Punjab Nat. Bank, Ltd.*, [1944] A. C. 176.

PART IV

PROMISSORY NOTES

Promissory note defined.

83. (1) A promissory note is an unconditional ⁸³ promise in writing made by one person to another ⁸⁴ signed by the maker, ⁸⁵ engaging to pay, on demand ⁸⁶ or at a fixed or determinable future time, ⁸⁷ a sum certain ⁸⁸ in money, ⁸⁹ to, or to the order of, a specified person ¹ or to bearer.²

Bowen, L.J., has given this description of promissory notes :— “ they are meant to include documents the contents of which consist substantially of a promise to pay a definite sum of money, and of nothing else ” ³; and Lord Atkin at a later date provided us with a fuller analysis : “ It is doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice. . . . Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused to commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid ” ⁴.

⁸³ *Coleman v. Cooke* (1742), Willes 393, at pp. 396, 397; 125 E. R. Cf. s. 8 (1) and note thereto.

⁸⁴ See *Beecham v. Smith* (1858), E. B. & E. 442; 120 E. R., and sub-s. (2).

⁸⁵ As to signature by the hands of an agent, see s. 91 (1), and as to the seal of a corporation in lieu of signature, see s. 91 (2).

⁸⁶ As to what instruments are, in legal effect, payable on demand, see s. 10.

⁸⁷ *Coleman v. Cooke* (1742), Willes 393, at pp. 396, 397; 125 E. R.; see s. 11 and notes thereto.

⁸⁸ See s. 9, and notes thereto.

⁸⁹ See s. 8 (1), and note thereto.

¹ See s. 8, and notes thereto.

² Cf. New York Negotiable Instruments Law, § 320, which, however, is confined to negotiable notes.

³ *Mortgage Insec. Corp. v. Inland Revenue Commrs.* (1888), 21 Q. B. D. 352, at p. 353. Cf. *Worth v. Weigel, etc.*, [1889] 3 A. E. R. 712.

⁴ *Akbar Khan v. Attar Singh*, [1886] 2 A. E. R. 545, at pp. 547 and 548. The case dealt with Indian law, but there is no difference here between Indian and English law.

By s. 5 (2), p. 17, where in a bill drawer and drawee are the same, or the drawee is fictitious or a person with no capacity to contract, the holder may treat the instrument as a promissory note. See also s. 20 (1) as to creating a promissory note out of a blank signature.⁵

ILLUSTRATIONS

1. An I O U containing a promise to pay may constitute a note⁶
2. A promissory note containing the clause, "No time given to, or security from, or composition entered into with, either party, shall prejudice the rights of the holder to proceed against any other party", is a valid promissory note⁷
The following are invalid as notes —
3. "Borrowed of C £100 to account for on behalf of the X Club at — months' notice, if required." (Signed) T. B.⁸
4. "I O U £20 for value received." (Signed) W B⁹
5. "Nine years after date I promise to pay C £100, provided X shall not return to England, or his death be certified in the meantime" (Signed) W B¹⁰
6. A receipt for Rs.48,900 with the addition "this amount to be payable after two years. Interest at the rate of Rs 5 4 0 per cent. per year to be charged".¹¹
7. "Reference A C 8 T R./W L I S Kischner, London, W.C.1 We confirm herewith that we undertake to pay irrevocably the sum of £200 to you or into your banking account on May 5, 1935, in respect of the above reference."¹²

Comparing this section with the wider terms of s. 88 of the Stamp Act, 1891, p. 849, it is clear that many instruments may require to be stamped as promissory notes which have not the mercantile incidents of notes as prescribed by the Act. A promissory note issued in the United Kingdom must be on an impressed stamp: see p. 849. An instrument invalid as a note may, of course, be valid as an agreement.¹³ A promissory note has been compared with a bill of exchange by Lord Mansfield¹⁴ and Parke, B.¹⁵ By s. 89 the provisions of the Act relating to bills apply, with certain modifications, to notes.

Form of words.—No particular form of words is essential to the validity of a note provided the requirements of this section be

⁵ See *Mason v. Laoh* (1929), 140 L. T. 696, and *Haseldine v. Winstanley*, [1936] 2 K. B. 101; *Britannia Electric Lamp, etc v. D. Mandler and another*, [1939] 2 A. E. R. 489.

⁶ *Brooks v. Elkins* (1836), 2 M. & W. 74; 150 E. R. *Sed Quare*, see *Akbar v. Attar Singh*, *supra*.

⁷ *Kirkwood v. Carrall*, [1908] 1 K. B. 581, C. A.

⁸ *White v. North* (1849), 3 Exch. 689; 154 E. R.

⁹ *Gould v. Coombs* (1845), 1 C. B. 543; 135 E. R.

¹⁰ *Morgan v. Jones* (1880), 1 C. & J. 162; 148 E. R.

¹¹ *Akbar Khan v Attar Singh*, [1936] 2 A. E. R. 545.

¹² *Worth v. Weigel*, [1939] 3 A. E. R. 712.

¹³ Cf. *White v. North* (1849), 3 Exch. 689; 154 E. R.; *Drury v. Macaulay* (1846), 16 M. & W. 148; 153 E. R.; *Kirkwood v. Smith*, [1896] W. N. 46 (16); *Black v. Pilcher* (1909), 25 T. L. R. 497; *Provincial Bank of Ireland v. Fisher*, [1918] 2 A. E. R. 469.

¹⁴ *Heylyn v. Adamson* (1753), 2 Burr. at p. 676; 97 E. R.

¹⁵ *Gibb v. Mather* (1882), 2 Cr. & J. at pp. 262, 263; 149 E. R., Ex. Ch.

fulfilled¹⁶; on the other hand, a document may at first sight comply with the terms of the section and yet not be a promissory note. It must be such as to show the intention to make a note.¹⁷ For instance, a banker's deposit note running, "Received of Mr. C. £150 to be accounted for on demand", and signed, will not be treated as a promissory note.¹⁸

Note in alternative.—An instrument promising to do anything in addition to the payment of money is clearly not a note,¹⁹ but it has been held in the United States that a promissory note may give the holder the option between the payment of the sum specified and the performance of some other act by the makers, though as to the latter it is not a note.²⁰ As the holder can demand money, and no option is given to the maker, it is said there is no uncertainty in the instrument. Thus, in New York, an instrument running, "I promise to pay C or order 100 dollars or in goods on demand", was held to be a valid note.²¹ This point does not appear to have been raised in any reported English case.

Note to bearer under £20.—In England a promissory note for less than £20 payable to bearer on demand must, by the Bank Notes Act, 1826 (7 Geo. 4, c. 6, s. 10), be made payable where issued, but may also be payable elsewhere.²²

Note to bearer under £5.—A promissory note for less than £5 payable to bearer on demand is, it seems, void in England (7 Geo. 4, c. 6, ss. 8, 5, and 7), except when issued by the Bank of England, which has power under the Currency and Bank Notes Act, 1928 (18 & 19 Geo. 5, c. 18), to issue bank notes for one pound and for ten shillings. The legislation on the subject is confused, but this seems to be its effect. The 48 Geo. 3, c. 88 (now repealed), made negotiable notes under twenty shillings void. The 17 Geo. 3, c. 80, required negotiable notes for more than twenty shillings and less than £5 (or on which less than £5 was unpaid) to specify the payee and conform to other regulations. This Act, *inter alia*, was suspended by the Promissory Notes Act, 1868 (26 & 27 Vict. c. 105), as to any

¹⁶ *Hooper v. Williams* (1848), 2 Exch. at p. 20; 156 E. R. See English and American cases reviewed in *Currer v. Lockwood* (1878), 16 Amer. R. 40. So, too, an instrument defective as a bill for want of the names of maker and drawee may be a good promissory note: *Mason v. Lack* (1929), 45 T. L. R. 868; *Peto v. Reynolds* (1854), 9 Exch. 410; affirmed, 11 Exch. 418, Ex. Ch.

¹⁷ *Sibree v. Trupp* (1848), 15 M. & W. at p. 29; 158 E. R.; cf. *Jackson v. Slipper* (1869), 19 L. T. 640.

¹⁸ *Hopkins v. Abbott* (1875), L. R. 19 Eq. 222. Cf. *Akbar v. Attar Singh*, *supra*.

¹⁹ *S. 3* (2); and *Fallett v. Moore* (1849), 4 Exch. 410, at p. 418; 154 E. R.; cf. *Cook v. Satterlee* (1826), 6 Cowen 108, New York.

²⁰ Cf. *Dismore v. Duncan* (1874), 57 New York R. 578; cf. New York Negotiable Instruments Law, § 24 (4).

²¹ *Hostater v. Wilson* (1862), 21 Barb. 807.

²² Modified by the Currency and Bank Notes Act, 1928, s. 1 (1) (b).

note "not being a note payable to bearer on demand". The Act of 1868 was a temporary Act, but was made permanent by the Expiring Laws Continuance Act, 1922 (12 & 13 Geo. 5, c. 50). The 17 Geo. 8, c. 80, is repealed by the Bills of Exchange Act: see the Act of 1868 set out p. 388. The Bank Notes (No. 2) Act, 1828 (9 Geo. 4, c. 65), prohibits the issue or negotiation in England of any note for less than £5 payable to bearer on demand which is made or issued, or purports to be made or issued, "in Scotland or Ireland, or elsewhere out of England". As to Scottish notes, see further, 5 Geo. 8, c. 49, and 26 & 27 Vict. c. 105.

Loan society notes.—Promissory notes given to registered loan societies are regulated by ss. 18 to 26 of the Loan Societies Act, 1840 (8 & 4 Vict. c. 110).

Bank notes.—A bank note may be defined as a promissory note issued by a banker payable to bearer on demand. But a bank note differs from an ordinary note in various important respects. Among others it may be re-issued after payment. Further distinctions have been pointed out by Bramwell, B.²³ As to the restrictions on the issue in England of bank notes by bankers other than the Bank of England, see p. 66. Bank of England notes form part of the ordinary currency of the kingdom, and therefore stand on a peculiar footing.²⁴ The statutory privileges of the Bank of England are expressly saved by s. 97 (3), and see notes, pp. 11 and 289.

Bank post bills.—As to the nature of a bank post bill, see *Forbes v. Marshall*.²⁵

I O U.—An I O U is not a negotiable instrument,²⁶ and requires no stamp. The production by the plaintiff of an I O U signed by the defendant, though not addressed to anyone by name, is evidence of an account stated between the parties, but not of money lent.²⁷ As to Scotland, see *Bell's Principles* (9th ed.), § 810.

²³ *Lichfield Union v. Greene* (1857), 26 L. J. Ex. at p. 142.

²⁴ See per Lord Mansfield in *Müller v. Race* (1759), 1 Burr. 452; 97 E. R.; 1 Smith L. C., 12th ed., p. 625; and per Jessel, M.R., in *Suffell v. Bank of England* (1882), 9 Q. B. D. at p. 568, C. A.; and see also p. 11.

²⁵ *Forbes v. Marshall* (1855), 24 L. J. Ex. 805; cf. *Willis v. Bank of England* (1835), 4 A. & E. 21; 111 E. R., and Hart on Banking, 3rd ed., p. 604, and 5 Geo. 3, c. 49.

²⁶ See *Akbar Khan v. Attar Singh*, [1886] 2 A. E. R. 545.

²⁷ *Fesenmayer v. Adcock* (1847), 16 M. & W. 449; 153 E. R. *Sed quære*; cf. *Douglas v. Holmes* (1840), 12 A. & E. 641. Both these cases were decided before the Evidence Act, 1851. An I O U would clearly be evidence supporting the allegation of a loan. It must be noted that there is a clear distinction between an account agreed upon for valuable consideration (which is to be challenged only on fraud, mistake, etc.) and an account stated from which rises merely a *prima facie* promise to pay. *Camillo Tanto, eto. v. Alexandria* (1921), 38 T. L. R. 184, and *Bisham Chand v. Lal* (1924), 50 T. L. R. 485. As to contradicting such evidence, see *Lemere v. Elliott* (1861), 30 L. J. Ex. 360; cf. *Quarrier v. Colston* (1842), 1 Phillips 147 (money lent for gambling in Germany); *German v. Yates* (1915), 82 T. L. R. 52 (assignment by surrender and giving I O U to a different person).

Foreign laws.—The French law as to notes (*billets à ordre*) is contained in Arts. 187, 188 of the Code de Commerce. Although the code is silent on the point, it seems that notes payable to bearer (*billets au porteur*) are to some degree recognised: *Nouguier*, §§ 1565—1578. German Exchange Law, Arts. 96—100, and Netherlands Code, Arts. 208, 209, deal with notes. The foreign codes, like this Act, apply to notes, *mutatis mutandis*, the provisions relating to bills of exchange.

Note payable to maker's order.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

ILLUSTRATIONS

1. B makes a note payable to his own order, and indorses it in blank. This is a valid note payable to bearer.²⁸

2. B makes a note payable to his own order, and indorses it to C. This is a valid note payable to C or order.²⁹

3. B, C and D made a joint and several note payable to C and D or order. This is a valid note. C and D may sue B on his several liability.³⁰

4. B & Co. make a note payable to C & Co. or order. X is a partner in both firms. C & Co. could, before the Judicature Acts, sue B & Co. on this note. But if C & Co. indorsed the note, the indorsee could sue.³¹

See s. 61 as to coincidence of right and liability at maturity. An action between a partner and the firm, or between two firms having a common member, was impossible at common law, but such suits are now provided for by R. S. C. Ord. XLVIII, r. 10. In Scotland a firm has always been recognised as an artificial person.

Note containing pledge of collateral security.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.³²

Would the right to the security pass with the instrument? The question has been touched upon, but not decided.³³ In France the security follows the instrument: *Nouguier*, § 715. The Belgian Code de Commerce, § 26, expressly enacts the same as to bills.

²⁸ *Hooper v. Williams* (1848), 2 Exch. 18; 154 E. R.; *Masters v. Baretto* (1849), 8 C. B. 438; 187 E. R.; *Stevenson v. Brown* (1902), 18 T. L. R. 268.

²⁹ *Gay v. Lander* (1848), 17 L. J. C. P. 286.

³⁰ *Beesham v. Smith* (1858), E. B. & E. 442; 120 E. R.

³¹ *Lindley*, 8th ed., p. 219; cf. *Neale v. Turton* (1837), 4 Bing. 149; 180 E. R.

³² *Wise v. Charlton* (1836), 4 A. & E. 786; 111 E. R.; cf. *Towne v. Rice* (1877), 122 Massachusetts R. 67; cf. New York Negotiable Instruments Law, § 24, and notes in Crawford's edition.

³³ *Storm v. Stirling* (1854), 3 E. & B. 692; 118 E. R.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

This reproduces with a modification the effect of the repealed 19 & 20 Vict. c. 97, s. 7. See s. 4 and note thereto, where the term "British Islands" is defined and the subject is discussed. By s. 89 (4), when a foreign note is dishonoured protest thereof is unnecessary, but for the purpose of charging a foreign party in his own country it is prudent to protest it.

Delivery necessary.

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.³⁴

By s. 2, delivery means transfer of possession, actual or constructive, from one person to another. As to the conditions of a valid delivery, see s. 21.

Joint and several notes.

85. (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.³⁵

The acceptors of a bill can only be liable jointly, not jointly and severally. A new maker cannot be added to a joint and several note after its issue,³⁶ and there cannot be a series of makers liable severally, and not jointly and severally. Nor can two makers be liable in the alternative.³⁷ Where an infant and his father make a joint and several note for money advanced to the infant, the infant is not liable, but the father is liable as the principal debtor.³⁸

A partner, as such, cannot bind his co-partners severally, but by a joint and several note he may bind the firm jointly³⁹ and himself severally.⁴⁰

Judgment, without satisfaction, against one of the makers of a joint note is a bar to proceedings against the other maker⁴¹; not so if the

³⁴ *Chapman v. Cottrell* (1865), 84 L. J. Ex. 186.

³⁵ Cf. *Ex p. Honey* (1871), L. R. 7 Ch. 178.

³⁶ *Gardner v. Walsh* (1855), 5 E. & B. 83; 119 E. R.

³⁷ *Ferris v. Bond* (1891), 4 E. & Ald. 679; 106 E. R.

³⁸ *Wauthier v. Wilson* (1912), 28 T. L. R. 289, C. A.

³⁹ *MacLae v. Sutherland* (1854), 8 E. & B. 1; 118 E. R.

⁴⁰ *Penkivil v. Connell* (1850), 5 Exch. 881; 155 E. R.

⁴¹ *King v. Hoare* (1844), 13 M. & W. 494; 153 E. R.; *Kendall v. Hamilton* (1879), 4 App. Cas. 504. This may now well be doubted on parity of reasoning with that governing the decision of *United Australia v. Barclays Bank*, [1940] 4 A. E. R. 20.

note be joint and several.⁴² Payment or satisfaction by one of the makers of a joint and several note discharges it,⁴³ but where partners are jointly and severally liable on a note a composition in bankruptcy as regards the joint estate does not get rid of the several liability.⁴⁴

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.⁴⁵

Conversely a note which runs, "We promise to pay", and is signed by two or more persons, is deemed to be a joint note only.⁴⁶

In a case where B, X, and Y were partners, and B made a note running, "I promise to pay", but signed it "for X and Y—J. B.", it was held that this was a joint note of the firm.⁴⁷

Perhaps if a note runs, "I, John Brown, promise to pay", and is signed by Smith as well as Brown, Smith would only be liable as an indorser under s. 56, and not as a co-maker.

Note payable on demand.

86. (1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.⁴⁸

By s. 10, read with s. 89, a note is payable on demand when it is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

Reasonable time appears to be a mixed question of law and fact. Regard must be had to the nature of the instrument as a continuing security, *e.g.*, ten months may not be an unreasonable time.⁴⁹

⁴² *Ibid.*; and *Re Davison* (1884), 13 Q. B. D. at p. 58; cf. *Wegg Prosser v. Evans*, [1898] 1 Q. B. 108, C. A.

⁴³ *Nicholson v. Revill* (1896), 4 A. & E. 675; 111 E. R.; *Beaumont v. Greathead* (1846), 2 C. B. 494; 135 E. R.; *Thorne v. Smith* (1851), 20 L. J. C. P. 71.

⁴⁴ *Simpson v. Henning* (1875), L. R. 10 Q. B. 406.

⁴⁵ *Monson v. Drakeley* (1873), 16 Amer. R. 74; cf. *Ridd v. Moggridge* (1857), 2 H. & N. 568; 157 E. R.; *dub.* Pollock, C.B.; *New York Negotiable Instruments Law*, § 36 (7).

⁴⁶ *Parsons on Bills*, Vol. 1, p. 247.

⁴⁷ *Ex p. Buckley* (1846), 14 M. & W. 469; 158 E. R.

⁴⁸ *Chartered Bank v. Dickson* (1871), L. R. 3 P. C. 574; see at p. 579.

⁴⁹ *Chartered Bank v. Dickson* (1871), L. R. 3 P. C. 574, at pp. 579 and 584.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.⁵⁰

This sub-section negatives the application of s. 86 (8) to promissory notes payable on demand, which are in the nature of continuing securities. In the United States it appears to be settled that a note on demand is deemed overdue after the lapse of a reasonable time from its issue, regard being had to its nature as a continuing security, e.g., it has been held that where a note on demand was indorsed eight months after its date, the indorsee took it subject to all equities attaching to it. It is to be noted that all parties resided in the same place.⁵¹

Presentment of note for payment to charge maker.

87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable.⁵² In any other case, presentment for payment is not necessary in order to render the maker liable.⁵³

ILLUSTRATIONS

1. A note is made payable to C or order on demand. The holder can sue the maker without proving any presentment on demand.⁵⁴

2. B makes a note payable to his own order and signs it. Below his signature are the words "Payable at the Union Bank, London." He then indorses the note in blank. The holder can sue the maker, B, without proving presentment.⁵⁵

3. A document instructing payment of £100 "two months after date to our order" was not signed by any person, but across it was written "Accepted payable at 2, Manville Road, Balham, S.W.17," with an impressed signature thereunder. If this were a promissory note the action failed because there was no proof that it was ever presented for payment.⁵⁶

⁵⁰ See *Brooks v. Mitchell* (1841), 9 M. & W. 15; 152 E. R.; *Glasscock v. Balls* (1889), 24 Q. B. D. 13, C. A.

⁵¹ *Herrick v. Woolverton* (1870), 41 New York R. 581; cf. New York Negotiable Instruments Law, § 181.

⁵² *Spindler v. Grellett* (1847), 1 Exch. 384; 154 E. R. (non-negotiable note); *Sands v. Clarke* (1849), 8 C. B. 761; 137 E. R.; *Vander Donckt v. Thellusson* (1849), 8 C. B. 812; *Randall v. Thorn & Co.*, [1878] W. N. p. 150, C. A.

⁵³ *Price v. Mitchell* (1815), 4 Camp. 200; 171 E. R.; *Exon v. Russell* (1818), 4 M. & S. 507; *Williams v. Waring* (1829), 10 B. & C. 2; 109 E. R. (place of payment indicated by way of memorandum).

⁵⁴ Cf. *Walton v. Mascall* (1844), 18 M. & W. at pp. 455, 458; 153 E. R.; see, too, *Norton v. Ellam* (1837), 2 M. & W. at p. 464; 150 E. R., and *Maltby v. Murrels* (1860), 5 H. & N. at p. 323; 157 E. R.

⁵⁵ *Masters v. Baretto* (1849), 8 C. B. 438; 137 E. R.

⁵⁶ *Britannia Electric Lamp Works, Ltd. v. D. Mandler, Ltd.*, [1899] 2 A. E. R. 469.

Compare s. 52 (1) and notes thereto as to presentment to charge the acceptor of a bill. By virtue of s. 52 (2) read with s. 89, where a note is payable on a day certain, the maker will not be discharged if the note be not presented on that day.⁵⁷ In the case of a note payable on demand, the Statute of Limitations runs in favour of the maker from the date of the note.⁵⁸

To charge indorser.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.⁵⁹

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable⁶⁰; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable,⁶¹ but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.⁶²

By s. 89 presentment for payment is governed by the rules applying to bills, for which see s. 45. As to excuses for non-presentment and delay, see s. 46.

Liability of maker.

88. The maker of a promissory note by making it—

- (1) Engages that he will pay it according to its tenor⁶³;
- (2) Is precluded from denying to a holder in due course⁶⁴ the existence of the payee and his then capacity to indorse.⁶⁵

The maker of a promissory note is the principal debtor on the instrument.⁶⁶

The maker is sometimes called the drawer, but the primary and

⁵⁷ See also *Ramchurn Mulhok v. Luchmesechund Radakissen* (1854), 9 Moore P. C. at p. 70; 14 E. R.; *Gordon v. Kerr* (1898), 25 Rottie 570.

⁵⁸ *Norton v. Ellam* (1887), 2 M. & W. 464; 150 E. R.

⁵⁹ *Cf. Gibb v. Mather* (1882), 2 Cr. & J. at pp. 262, 283; 149 E. R.; *Britt v. Lawson* (1878), 22 Hun. R. 128, New York (joint and several note).

⁶⁰ *Roche v. Campbell* (1812), 8 Camp. 247; 170 E. R.

⁶¹ *Saunderson v. Judge* (1795), 2 H. Bl. 510; 128 E. R.

⁶² *Ibid.*; and see *Masters v. Baretto* (1849), 8 C. B. 438; 137 E. R.

⁶³ Story on Notes, § 118; *Walton v. Mascoll* (1844), 13 M. & W. at p. 458; 158 E. R.

⁶⁴ See "holder in due course" defined by s. 29.

⁶⁵ *Drayton v. Dale* (1823), 2 B. & C. 298; 107 E. R. (bankrupt payee); *Lane v. Kreakle* (1869), 22 Iowa R. 399; cf. s. 54 (acceptor's estoppels); New York Negotiable Instruments Law, § 110.

⁶⁶ *Cf. Chartered Bank v. Dickson* (1871), L. R. 3 P. O. at p. 580.

absolute liability of the maker of a note must be distinguished from the secondary and conditional liability of the drawer of a bill of exchange.⁶⁷ In general the maker of a note corresponds with the acceptor of a bill of exchange, and the same rules apply to both. A note indorsed by the payee resembles an accepted bill payable to drawer's order and indorsed by the drawer, the payee corresponding with the drawer.⁶⁸ The distinctions that exist between maker and acceptor arise from this. The acceptor is not the creator of a bill, his contract is supplementary, while the maker of a note originates the instrument. Hence (a) a note cannot be made conditionally,⁶⁹ while a bill may be accepted conditionally; (b) the provisions of s. 19 (2) relating to bills accepted payable at a particular place have no application to notes, which are therefore on the same footing as bills previous to the 1 & 2 Geo. 4, c. 78, which is reproduced in that section⁷⁰; (c) maker and payee are immediate parties in direct relation with each other, while acceptor and payee, except in the case of a bill payable to drawer's order, are remote parties.⁷¹ See also s. 89—*Damages*. The measure of damages against the maker of a note would in general be the same as against the acceptor of a bill, as to which see s. 57.

Application of Part II to notes.

89. (1) Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.⁷²

(8) The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance *supra* protest;
- (d) Bills in a set.

⁶⁷ *Guinnell v. Herbert* (1836), 6 N. & M. 723.

⁶⁸ *Heglyn v. Adamson* (1758), 2 Burr. at p. 678; 97 E. R., Lord Mansfield; and s. 59 (2).

⁶⁹ See s. 83.

⁷⁰ Cf. *Gibbs v. Mather* (1832), 2 Cr. & J. at pp. 262, 263; 149 E. R.; *Emblin v. Dartnell* (1844), 12 M. & W. 890; 152 E. R.

⁷¹ Cf. *Bishop v. Young* (1800), 2 B. & F. at p. 83; 126 E. R., Lord Eldon.

⁷² See *Heglyn v. Adamson* (1758), 2 Burr. at p. 678; 97 E. R., *per* Lord Mansfield; cf. *Re George* (1890), 44 Ch. D. at p. 681.

Protest of foreign note not required.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

By the statute 3 & 4 Anne, c. 8, s. 1, promissory notes were made negotiable "in the same manner as inland bills of exchange are or may be by the custom of merchants". That Act, however, was, it seems, merely declaratory,⁷³ and is repealed by this Act.

Sub-s. 4 is declaratory,⁷⁴ but it may be advisable to protest a foreign note for the purpose of charging a foreign party in his own country. See s. 51 as to foreign bills. As to conflict of laws, see s. 72 (8). The sub-section appears to apply only to foreign notes dishonoured in the British Islands. Cf. s. 4 as to inland and foreign bills.

⁷³ See *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 350, *per* Cockburn, C.J.

⁷⁴ *Bonar v. Mitchell* (1850), 5 Exch. 415; 155 E. R. Cf. New York Negotiable Instruments Law, § 189.

PART V

SUPPLEMENTARY

Good faith.

90. A thing is deemed to be done in good faith within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.⁷⁵

See s. 29 defining "holder in due course", and s. 59 defining "payment in due course". Cf. also ss. 60, 79, and 82.

Test of bona fides.—The test of *bona fides* as regards bill transactions has varied greatly. Previous to 1820 the law was much as it now is under the Act. But under the influence of Lord Tenterden due care and caution was made the test,⁷⁶ and this principle seems to be adopted by s. 9 of the Indian Negotiable Instruments Act. In 1884 the Court of King's Bench held that nothing short of gross negligence could defeat the title of a holder for value.⁷⁷ Two years later Lord Denman states it as settled law that bad faith alone could prevent a holder for value from recovering. Gross negligence might be evidence of bad faith, but was not conclusive of it.⁷⁸ This principle has never since been shaken in England, and it seems now firmly established in the United States.⁷⁹

Byles, J., in a judgment where he is distinguishing deeds from negotiable instruments, says, referring to the latter, "Honest acquisition confers title. To this despotic but necessary⁸⁰ principle the rules of the common law are made to bend. . . . Negligence in the maker of such an instrument makes no difference in his liability to an honest holder for value. The instrument may be lost by the maker without his negligence, or stolen from him, still he must pay; the negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stops short of fraud, he has a title".⁸¹

⁷⁵ Cf. s. 62 (2) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), defining good faith in the same words.

⁷⁶ *Gill v. Cubitt* (1824), 5 D. & R. 324; 171 E. R.

⁷⁷ *Crook v. Jads* (1884), 5 B. & Ad. 909, 106 E. R.

⁷⁸ *Goodman v. Harvey* (1886), 4 A. & E. at p. 876; cf. *Uther v. Rich* (1889), 10 A. & E. 784.

⁷⁹ *Murray v. Larimer* (1864), 2 Wallace, at p. 121, Sup. Ct. U. S.; *Chapman v. Rose* (1874), 56 New York R. at p. 140.

⁸⁰ Why necessary? Possibly wise and doubtless expedient but not absolutely necessary.

⁸¹ *Swan v. North British Australasian Co.* (1863), 2 H. & C. 184; 159 E. R.

The whole subject was fully discussed in a case in the Court of Appeal, where the question was whether the giving of a certain bill was a fraud by the drawer and acceptor on their creditors. Baggallay, L.J., in giving judgment, says, "I fully recognise the importance of maintaining the well-established principle that negligence or carelessness on the part of the holder of a bill is not of itself sufficient to deprive him of his remedies for procuring its payment. But negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of *mala fides*; and the question in this case is whether the surrounding circumstances accompanying the negligence or carelessness of the holder were such as to affect him with notice of the fraudulent character of the transaction out of which these bills originated".⁵² Every case must be determined on its own merits. Good faith or bad faith is a question of *fact* depending on the circumstances of the individual case.⁵³ It is for the tribunal, whether Court or jury, that has to decide questions of fact, to determine whether a particular holder took a given bill *bona fide* or not. To this issue they must apply their common sense. As Brett, L.J., observes in the same case, "If a jury has to consider facts, they are entitled and bound to make use of their general knowledge of business, in order to appreciate the evidence which is before them; and, if a Court has to consider evidence, I think the Judges are bound to use their own general knowledge of business, and of the ordinary moving motives of mankind, just as a jury would".

Lord Blackburn, in the House of Lords, thus sums up the law on the subject: "I consider it to be fully established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances that might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris* or when the bill is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave value for the bill, *whether the value be great or small*, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth, he would have found, not that the man

⁵² *Re Gomersall* (1876), 1 Ch. D. at p. 146, C. A.

⁵³ *Peacock v. Rhodes* (1781), 2 Doug. 688; 99 E. R., per Lord Mansfield.

had stolen it, but that he had obtained it by false pretences, I think that would not have made any difference if he knew there was something wrong about it and took it. If he take it in that way he takes it at his peril. But then, I think, such evidence of carelessness or blindness as I have referred to may, with other evidence, be good evidence upon the question whether he did know there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank note when he ought not to have taken it, still he is entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions not because he was an honest blunderer, but because he thought in his own secret mind—I suspect there is something wrong, and, if I make further inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty.”⁸⁴

Signature.

91. (1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

ILLUSTRATIONS

1. Bill payable to C's order, and indorsed in his name. It is proved that C's wife had authority to indorse bills for him, and that in this case C's indorsement was written by his daughter in the presence and by the direction of his wife. This is sufficient.⁸⁵

2. Bill addressed to B, and accepted in his name. It is shown that X, who wrote the acceptance, is in the habit of accepting bills in B's name, and that B is aware of it, and duly honours such bills. This is evidence from which an authority to X to accept bills for B may be implied.⁸⁶

3. C, the holder of a bill payable to order, transfers it for value to D without indorsing it. This is not an authority to D to indorse it in C's name.⁸⁷

4. It is shown that X has an express authority to draw bills in A's name. This of itself is not sufficient to show that he has authority to indorse bills for A.⁸⁸

5. An express authority to an agent to receive payment from B, by drawing on him, does not authorise the agent to draw a bill payable to his own order.⁸⁹

⁸⁴ *Jones v. Gordon* (1877), 2 App. Cas. at p. 629, H. L.; and note the judgment of Lord Herschell in *Derry v. Peek* (1889), 14 App. Cas. 937, at p. 974, where he discards the theory of “legal fraud”, and points out that there is no *tertium quid* between good faith on the one hand and bad faith or fraud on the other hand.

⁸⁵ *Lord v. Hall* (1849), 8 C. B. 627; 137 E. R.; cf. *Lindus v. Bradwell* (1848), 5 C. B. at p. 591; 136 E. R.

⁸⁶ Cf. *Morris v. Bethell* (1869), L. R. 5 C. P. at p. 51.

⁸⁷ *Harrop v. Fisher* (1861), 80 L. J. C. P. 288.

⁸⁸ Cf. *Prescott v. Flinn* (1892), 9 Bing. at p. 22; 180 E. R.; and Indian Act, s. 27.

⁸⁹ *Hogarth v. Wherley* (1875), L. R. 10 C. P. 680; and Indian Act, s. 27.

6. An authority to a partner in a nontrading firm to draw cheques does not authorise drawing post-dated cheques, which for most purposes are equivalent to bills payable after date⁹⁰

Signature by agent.—See further s. 23, signature in assumed name, or firm name; s. 24, forged or unauthorised signature; s. 25, procuration signature; s. 20, signature by agent or representative. The above cases show that it is immaterial by whose hand the signature is attached if there be authority, express or implied, to sign, but that where the authority is express it must be strictly construed. In *Lord v. Hall* (Illustration 1),⁹¹ Maule, J., says: "The question is whether upon the evidence the wife was not acting in the strict exercise of the authority conferred on her by her husband in doing what she did, namely, in requesting a third person to do it in her presence. There was evidence that the wife had the general management of her husband's business. And when he authorised her to draw, accept, and indorse bills in his name, that may fairly be extended to authorising her to select some person, *pro hac vice*, to write the name of her husband for her. It may be that this may lead to some inconvenience. . . . I find a case of *Ex p. Sutton* (2 Cox Ch. C. 84), which may be worth considering with reference to this subject. It was there held that an authority given to A to draw bills in the name of B may be exercised by the clerks of A. The way in which that case seems to me to apply to the present is this: the Lord Chancellor treats the extent of the authority as a matter of fact to be inferred from the evidence."

What a sufficient signature.—"Signature" may perhaps be defined as the writing of a person's name on a bill or note in order to authenticate and give effect to some contract thereon. A pencil signature to a bill has been held sufficient⁹²; and it has been suggested that a lithographed or stamped signature might be sufficient.⁹³ A signature made by another person, but attested by mark, is sufficient.⁹⁴ A note which ran, "I, William Smith, promise to pay, etc." instead of the usual "I promise to pay", with the signature below, was held sufficiently signed,⁹⁵ but such a signature is inconvenient and irregular. Where a statute requires an ordinary contract or document to be signed, a mere mark,⁹⁶ or initials,⁹⁷ or a stamp,⁹⁸

⁹⁰ *Forster v. Mackreth* (1867), L. R. 2 Ex. 163 (firm of solicitors).

⁹¹ (1849), 8 C. B. at p. 680; 137 E. R.

⁹² *Geary v. Physic* (1826), 5 B. & C. 284; 108 E. R.

⁹³ See *Ex p. Birmingham Bank* (1868), L. R. 3 Ch. App. at pp. 653, 654. See also *Bird & Co. v. Thomas Cook and another*, [1887] 2 A. E. R. 227.

⁹⁴ *George v. Surrey* (1880), M. & M. 516; 178 E. R.

⁹⁵ *Taylor v. Dobbins* (1719), 1 Sta. 899; 198 E. R.; cf. *Ruff v. Webb* (1794), 1 Esp. 129; 170 E. R.

⁹⁶ *Baker v. Denning* (1886), 8 A. & E. 94; 112 E. R.

⁹⁷ *Caton v. Caton* (1867), L. R. 2 H. L. 148.

⁹⁸ *Saunderson v. Jackson* (1800), 2 B. & P. 288; 136 E. R.

if intended as signatures, are sufficient; and it is immaterial in what part of the document the name is introduced, provided it govern the whole. But legal analogies must be applied with caution to bills which are the creation of custom, and where it is of the utmost importance that a clear title should appear on the face of the instrument. In some American States the rule is lax. A person who signed by initials was held liable as indorser of a cheque,⁹⁹ and the same was held as to a person who indorsed by mark, viz., by writing the figures 1, 2, 3.¹ By German Exchange Law, Art. 94, signature by mark is insufficient unless made before a notary.

Signature obtained by fraud as to nature of document.—The object of a signature is to authenticate a document. Where, then, a person is induced by fraud to sign a bill or note under the belief that he is signing a wholly different instrument, his signature is null and void, provided that in so signing he acted without negligence. Thus :—

1. D, an old man with enfeebled sight, is induced to sign his name on the back of a bill, by being told that it is a railway guarantee which he had promised to sign. The bill is negotiated to a holder in due course. D is not liable as an indorser.²

2. B is induced by fraud to sign a negotiable note as maker, believing it to be a non-negotiable note for a less sum. Negligence is negatived. If the note is negotiated to a holder in due course, he (probably) cannot recover from B.³

3. B, a young man inexperienced in business, is induced by a friend in whom he has confidence to sign a promissory note as joint maker, under the belief that he is simply signing as an attesting witness. Negligence is negatived. The payee, who takes the note in good faith and for value, cannot recover on it from B.⁴

In *Foster v. Mackinnon*, Byles, J., says: "The defendant, according to the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been without his knowledge a bill of exchange or promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature for two reasons

⁹⁹ *Merchants' Bank v. Spicer* (1881), 6 Wend. 448.

¹ *Brown v. Butchers' Bank* (1844), 6 Hill 448.

² *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704; distinguished in *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K. B. 489.

³ *Griffiths v. Kellogg* (1876), 20 Amer. R. 48.

⁴ *Lewis v. Clay* (1897), 14 T. L. R. 149.

—first, that he never in fact signed the writing declared on, and, secondly, that he never intended to sign any such contract".⁵ Frauds of this nature are more frequent in the United States than in England, owing to the absence of stamp laws. A man's signature is obtained for some pretended purpose, and then a promissory note is overwritten.

Seal of corporation as signature.

(2) In the case of a corporation where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

Before this enactment it was very doubtful whether a bill or note issued by a corporation under its seal constituted a negotiable instrument.⁶ It was never doubted that a corporation (otherwise competent) could be bound by a bill or note duly signed on its behalf; and this was one of the recognised exceptions to the rule that a corporation can only contract under seal.⁷ It had further been held that a note made by the directors of a company, which was binding on them personally, was not affected by the addition of the corporate seal.⁸ In New York it was formerly held that a promissory note under seal was not negotiable unless issued by government.⁹

Signature of corporation or company.—The usual form of signature for a corporation is a procuration signature. The form in which a bill or note must be drawn, made, indorsed, or accepted so as to bind the company is regulated by ss. 98 and 80 of the Companies Act, 1929 (See Appendix, p. 859). To determine whether a company or other corporation is liable on a bill, three questions must be asked: 1. Has the company the requisite capacity to bind itself by a bill? 2. Is the signature on the bill sufficient in form to bind the company? 3. Was the signature placed there by a person having authority to sign bills for the company? Is it immaterial that a person who acts within the scope of his authority in signing bills exceeds or contravenes private instructions?¹⁰ Several recent decisions have explained, and

⁵ (1869), L. R. 4 C. P. 704, see at p. 712.

⁶ *Crauch v. Crédit Foncier* (1878), L. R. 8 Q. B. at pp. 882, 883.

⁷ Grant on Corporations, p. 61.

⁸ *Dutton v. Marsh* (1871), L. R. 6 Q. B. 361.

⁹ *Merritt v. Cole* (1876), 9 Hun. R. 98; but see now § 25 of the New York Negotiable Instruments Law, and notes in Crawford's edition.

¹⁰ *Re Land Credit Co.* (1869), L. R. 4 Ch. 460. As to the powers of *de facto* directors, cf. *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869. As

possibly somewhat limited the scope of, the decisions in *Royal British Bank v. Turquand*¹¹ and *Mahoney v. East Holford Mining Co.*¹² that a person dealing with a limited company is entitled to assume that articles have been complied with; and thus that the individual signing the bill on the company's behalf has observed the terms in the articles. But it is clear that if the bank which is put on inquiry as to the authority of a director to sign cheques has been negligent, the rule laid down in the above cases has no place.¹³ And also where bills were drawn by a branch manager of a company in the company's name to which he forged the signatures of directors and used by him to pay his private debts the rule did not avail the defendants since the instrument was a forgery.¹⁴ See further, s. 22 and notes thereon.

Liquidators.—When a company, under the Companies Act, 1929, is voluntarily wound up, and two or more liquidators are appointed, a bill must be signed by at least two liquidators in order to bind the company.¹⁵

Computation of time.

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

“Non-business days” for the purposes of this Act mean—

(a) Sunday, Good Friday, Christmas Day :

(b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it :

(c) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

to the authority of a manager in a foreign country, see *Re Cunningham & Co., Ltd.* (1887), 36 Ch. D. 532.

¹¹ (1856), 6 E. & B. 327.

¹² (1875), L.R. 7 H. L. 869.

¹³ *B. Liggett (Liverpool), Ltd. v. Barclays Bank*, [1928] 1 K. B. 48; *Houghton v. Northard, Lowe and Wills*, [1927] 1 K. B. 246. A banker's actual knowledge of a company's rules for signing cheques may affect him with notice of irregularity when apparently instructed as to the disposal of the company's money; *Bank of Montreal v. Dominion Graham Co.*, [1930] A. C. 659.

¹⁴ *Kreditbank Cassell v. Schenkers, Ltd.*, [1927] 1 K. B. 826, following *Ruben v. Great Fingall Consolidated*, [1906] A. C. 489. Cf. *Wright, J.*, in *Slingsby v. District Bank*, [1932] 1 K. B. 544.

¹⁵ *See p. Agra Bank* (1871), L. R. 6 Ch. 206. See s. 191 (2) (d) of the Act of 1929 as to liquidators' powers as to bills and notes, and s. 228 as to liquidators in voluntary winding up.

See s. 42 as to leaving bills for acceptance; s. 49 (12) as to notice of dishonour; and s. 67 (2) as to presentment to the acceptor for honour.

See the Bank Holidays Acts in the Appendix, pp. 341—348, and s. 14 (1).

When noting equivalent to protest.

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

This section affirms the rule laid down in *Geralopulo v. Wieler*.¹⁶ The noting is in fact an incipient protest, and "is unknown in law as distinguished from the protest. The notary having made his minute, draws up the protest at his leisure".¹⁷

As to the application of this section, see ss. 51, 65, 67, 68.

Protest when notary not accessible.

94. Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured,¹⁸ any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.¹⁹

The form given in Schedule I to this Act may be used with necessary modifications, and if used shall be sufficient.

For suggested meanings of the ambiguous and elusive term "place", see p. 158.

For the form referred to, see p. 292. The enactment contained in this section is an extension of the inoperative provision of the repealed 9 Will. 3, c. 17, as to inland bills.

¹⁶ (1851), 20 L. J. C. P. 105; cf. *Leftley v. Mills* (1791), 4 T. R. at p. 175; 100 E. R.

¹⁷ Selwyn N. P., 11th ed., p. 381.

¹⁸ See *Somerville v. Aaronson* (1898), 25 R. 524 (Scotland).

¹⁹ New York Negotiable Instruments Law, § 262, reproduces this provision in wider terms.

Dividend warrants may be crossed.

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

For the provisions as to crossed cheques, see ss. 76-82. The corresponding provision of the Crossed Cheques Act, 1876, s. 8, applied only to the dividend warrants of the Bank of England and Bank of Ireland. The present enactment applies to all dividend warrants. The word "dividend" includes sums payable as interest on Government Stock.²⁰

Repeal.

[**96.** The enactments mentioned in the second Schedule to this Act²¹ are hereby repealed as from the commencement of this Act to the extent in that Schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.]

This section and the schedule of repeals, having done their work, are now repealed as spent by the Statute Law Revision Act, 1898.

Savings.

97. (1) The rules of bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto, notwithstanding anything in this Act contained.

Bankruptcy law.—This provision was intended to preserve such rules as the rule against double proof,²² the rule as to proof in respect of bills not yet due,²³ or the rule that when a bill is pledged for less than its amount, the holder may prove for the full amount, though he cannot receive dividend for more than the sum advanced.²⁴ For England, see the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), and *Williams' Bankruptcy* (18th ed.), index heading "Negotiable Instruments", and for Scotland, see the Bankruptcy Act, 1913

²⁰ *Slingsby v. Westminster Bank*, [1881] 1 K. B. 178.

²¹ P. 293.

²² *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 165.

²³ *Wood v. De Mattos* (1885), L. R. 1 Ex. 81.

²⁴ *Ex p. Newton, re Bunyard* (1880), 16 Ch. D. 380, C. A.

(8 & 4 Geo. 5, c. 20). For Northern Ireland, see the ten Acts indexed in the "Index to the Statutes in Force".

Common law.

(2) The rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

This provision preserves a foreign drawer's right to prove for re-exchange against an English acceptor.²⁵ So, too, it preserves the general rules of law relating to estoppels,²⁶ and the rules of private international law, *e.g.*, the rule according to which the transfer of personal property is governed by the law of the country in which the property is transferred.²⁷

Custom of trade.—Questions relating to bills, when not concluded by authority, must as heretofore be determined by the usage of trade, if such there be.²⁸ The existence, nature, and scope of a given usage is a question of fact.²⁹ A general usage once incorporated into a judicial decision becomes part of the law merchant, and evidence of custom to contradict it is inadmissible.³⁰ Thus :—

1. Bill indorsed "Pay O", omitting the words "or order". The Court of King's Bench having decided that such bills are still negotiable by indorsement, evidence that by custom they are not negotiable is inadmissible.³¹

2. If a foreign bill be dishonoured the indorser is by the law merchant liable for the re-exchange. Evidence that by local custom the holder is entitled either to the re-exchange or to the amount he gave for the bill, at his option, is inadmissible.³²

3. Action by customer (before the Stamp Act, 1870) against banker for not honouring a cheque. The banker may show that the cheque was marked "post-dated", and that it was the custom of bankers in the City of London not to honour cheques which are marked "post-dated".³³

*Goodwin v. Roberts*³⁴ established that the novelty of a general usage is no objection to its being incorporated into the law merchant.

²⁵ *Ex p. Roberts, re Gillespie* (1886), 16 Q. B. D. 702; affirmed, 18 Q. B. D. 286, C. A.

²⁶ *Smith v. Prosser*, [1907] 2 K. B. at p. 746, C. A.; cf. *London Joint Stock Bank v. MacMillan*, [1918] A. C. 777, H. L. (negligence in drawing cheque).

²⁷ *Embricos v. Anglo-Austrian Bank*, [1904] 2 Q. B. 870; affirmed, [1905] 1 K. B. 677, C. A. See, further, notes to s. 72 (2).

²⁸ *Goodwin v. Roberts* (1875), L. R. 10 Ex. 387, Ex. Ch.

²⁹ *Ibid.*

³⁰ *Ibid.*, at p. 387; and cf. *Brandao v. Barnett* (1846), 8 C. B. at p. 580; 136 E. R., H. L.

³¹ *Edie v. East India Co.* (1761), 2 Burr. 1216; 97 E. R. See now s. 8.

³² *Suse v. Pompe* (1880), 80 L. J. C. P. 75.

³³ *Emanuel v. Roberts* (1888), 9 B. & S. 121. *Qu.* since the Stamp Act, 1870, if cheque be not presented before its nominal date; and see s. 13 (2).

³⁴ *Goodwin v. Roberts* (1875), L. R. 10 Ex. 387, thereby to some extent overruling *Crouch v. Crédit Foncier* (1878), L. R. 8 Q. B. at p. 386. See at p. 354, where the practice of a particular trade is distinguished from a general custom. But

A particular or local usage must be proved *de novo* each time, until it becomes so notorious that the Courts will take judicial notice of it. It is difficult to say when this notoriety is acquired.³⁵ When both authority and custom are silent, foreign law is usually resorted to as a guide. After referring to the cosmopolitan character of the law merchant in reference to bills, Lord Blackburn says: "There are in some cases differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the law merchant are the same in all countries. . . . We continually, in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases when they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier or any foreign jurist, provided they bore upon the point".³⁶

Ambiguous Instruments.—When the terms of a bill are ambiguous, the construction most favourable to the full validity of the instrument must be followed.³⁷ Thus:—

1. An acceptance will, if possible, be construed as absolute, not qualified, and a mere memorandum, inconsistent with such construction, is to be rejected as being no part of the acceptance.³⁸

2. The address to the drawee will be read in with the acceptance, *ut res magis valeat*.³⁹

3. Note in the form "I promise not to pay". The word "not" will be rejected.⁴⁰

Savings.

(8) Nothing in this Act or in any repeal effected thereby shall affect—

cf. Brett, M.R., in *Swendsen v. Wallace* (1884), 13 Q. B. D. 69, at p. 72: "It was urged that . . . the proposition . . . ought now to be adopted in order to bring the principle of English law on the subject in consonance with the laws of all other countries. But to this I cannot agree. It is useless to inquire into whether the law is, as stated, the same in all European countries. For if it is, yet no English Court has any mission to adapt the law of England to the laws of other countries; it has authority only to declare what the law of England is". See also Bigham, J., in *Edelstein v. Schuler*, [1902] 2 K. B. at p. 154—"in these days usage is established much more quickly than it was in days gone by; more depends upon the number of transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago".

³⁵ Cf. *Ex p. Turquand* (1888), 14 Q. B. D. 686, at p. 645, C. A.

³⁶ *M'Lean v. Clydesdale Bank* (1883), 9 App. Cas. at p. 105. Cf. *Scaramanga v. Stamp* (1880), 5 C. P. D. at p. 808, as to American decisions. But see p. 287, n. 84.

³⁷ *Mare v. Charles* (1856), 5 E. & B. at p. 981; 119 E. R., Lord Campbell.

³⁸ *Fayshawe v. Peet* (1857), 26 L. J. Ex. 314; and cf. *Stone v. Metaalfe* (1815), 4 Camp. 217; 171 E. R.; *Pitch v. Jones* (1866), 5 E. & B. at p. 246; 119 E. R.; *Decroix v. Meyer* (1890), 25 Q. B. D. 843, C. A.

³⁹ *Mare v. Charles* (1856), 5 E. & B. 978; 119 E. R.

⁴⁰ *Russell v. Langstaffe*, cited Bayley on Bills, 6; and *Simpson v. Vaughan* (1789), 2 Atkyns 30; 26 E. R.

- (a) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue :

See the material provisions of the Stamp Act, 1891 (which repeals the Act of 1870), as amended to date, set out p. 845.

- (b) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies :

See ss. 80 and 98 of the Companies Act, 1929, set out p. 859.

Bank of England or Ireland.

- (c) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively :

See the forty-eight statutes regulating the Bank of England classified and briefly analysed in the Official Index of the Statutes in Force. As to the privileges of that Bank in relation to the issue of bank notes in England, see p. 11, and note the position of the Bank and its notes under the Gold Standard Act, 1925 (15 & 16 Geo. 5, c. 29), which establishes a gold standard, but does not restore the gold currency in the United Kingdom.⁴¹

See the twenty-five statutes regulating the Bank of Ireland classified in the Official Index of the Statutes in Force. The head office of the Bank is in the Irish Free State, and the Bank is presumably subject to its jurisdiction, but it has a branch in Northern Ireland, and that branch is the official bank of the British Government for all Imperial purposes; see s. 6 (1) (d) of the Irish Free State (Consequential Provisions) Act, 1922 (18 Geo. 5, sess. 2, c. 2), and Order in Council of February 12, 1928. But, so far as finance is controlled by the Government of Northern Ireland, the account of that Government has been removed from the Bank of Ireland, and has been transferred to the Belfast Banking Co. as the Exchequer bank of Northern Ireland; see the Northern Ireland Exchequer and Audit Act, 1921 (12 & 13 Geo. 5, c. 2), and Stat. Rules and Orders, 1922 (No. 80), p. 705, and warrant issued thereunder.

The ten large banks in Scotland and some banks in Ireland have the right to issue bank notes, and for an amount less than £5. See on this

⁴¹ Sub-s. (2) of s. 1 of the Act of 1925 is of no effect unless and until His Majesty by Proclamation otherwise directs: Gold Standard (Amendment) Act, 1931 (21 & 22 Geo. 5, c. 46).

point and generally, *Palgrave's Dictionary of Political Economy*, tit. "Banks", and *Conant's Banks of Issue*.

Dividend warrants.

- (d) The validity of any usage relating to dividend warrants, or the indorsement thereof.

This provision was introduced in committee. Formerly, if a dividend warrant were payable to the order of two or more persons, the practice was to pay it on the indorsement of any one of them. As to ordinary bills and notes, see s. 82 (8). See further for dividend warrants, p. 826.

Savings of summary diligence in Scotland.

98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect, the law and practice in Scotland in regard to summary diligence.

Summary diligence in Scotland is founded on a protest for non-acceptance or non-payment which must be registered within six months.⁴² It is only competent where the instrument is regular on the face of it. For details of the practice see *Hamilton's Bills of Exchange Act*, pp. 206 *et seq.*

A summary procedure to enforce bills, notes and cheques was provided for England by the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), commonly known as Keating's Act. This enactment has been superseded as regards the High Court by Order XIV, and as regards County Courts by the County Courts Act, 1919 (9 & 10 Geo. 5, c. 78), s. 27 and Sched., but it is still in force with modifications in some inferior Courts.

Construction with other Acts, etc.

99. Where any act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

Parole evidence allowed in certain judicial proceedings in Scotland.

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory

⁴² *M'Neill v. Innes* (1917), 54 So. L. B. 518; cf. *Inglis v. Rothfield*, [1920] S. C. 660 (note given to moneylender). By s. 18 (h) of the Moneylenders Act, 1927, this remedy is made incompetent to a moneylender; see *Murray v. M'Guire*, [1928] S. C. 647.

note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution, as the Court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

This section was added in committee. Its object was to remove certain technicalities from the Scots law of evidence which had frequently been adversely commented upon by the Courts. In many cases relevant facts could only be proved by writ or oath. See *Hamilton*, p. 217, and *Bell's Principles* (9th ed.), § 888 b. A somewhat wide construction has been put upon the section in the direction of allowing parole evidence to vary the contracts of the parties to bills or notes.⁴³

The sesennial prescription, which is the prescription applicable to bills and notes, runs from the time when payment is demandable.⁴⁴ After that time the holder can only establish his claim by the writ or oath of the debtor, unless the statute has been interrupted by judicial demand or executed diligence.⁴⁵

⁴³ *Dryborough v. Roy* (1908), 5 F. 665; *Viani & Co. v. Gunn & Co.* (1904), 6 F. 989; *Manchester Banking Co. v. Ferguson & Co.* (1905), 7 F. 865.

⁴⁴ *Bell's Princ.*, 9th ed., § 849; 12 Geo. 3, c. 72, ss. 87, 89.

⁴⁵ *Bell's Princ.*, 9th ed., §§ 598, 599; see, e.g., *MacBain v. MacBain*, [1930] S. C. (H. L.) 72.

SCHEDULES

Section 94.

FIRST SCHEDULE

FORM OF PROTEST WHICH MAY BE USED WHEN THE SERVICES
OF A NOTARY CANNOT BE OBTAINED.

Know all men that I, A. B. [householder], of
in the county of , in the United Kingdom, at
the request of C. D., there being no notary public available,
did on the day of , 18 , at ,
demand payment [or acceptance] of the bill of exchange
hereunder written, from E. F., to which demand he made
answer [state answer, if any] wherefore I now, in the
presence of G. H. and J. K., do protest the said bill of
exchange.

(Signed) A. B.

G. H. }
J. K. } Witnesses.

N.B.—The bill itself should be annexed, or a copy of
the bill and all that is written thereon should be under-
written.

See s. 94 as to this form.

SECOND SCHEDULE

Enactments Repealed

Session and Chapter.	Title of Act and extent of Repeal.
9 Will. 3, c. 17	An Act for the better payment of Inland Bills of Exchange.
3 & 4 Anne, c. 8	An Act for giving like remedy upon Promissory Notes as is now used upon Bills of Exchange, and for the better payment of Inland Bills of Exchange.
17 Geo. 3, c. 30	An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England.
39 & 40 Geo. 3, c. 42	An Act for the better observance of Good Friday in certain cases therein mentioned.
48 Geo. 3, c. 88	An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum in England.
1 & 2 Geo. 4, c. 78	An Act to regulate Acceptances of Bills of Exchange.
7 & 8 Geo. 4, c. 15	An Act for declaring the law in relation to Bills of Exchange and Promissory Notes becoming payable on Good Friday or Christmas Day.
9 Geo. 4, c. 24	An Act to repeal certain Acts, and to consolidate and amend the laws relating to Bills of Exchange and Promissory Notes in Ireland, in part; that is to say, Sections two, four, seven, eight, nine, ten, eleven.
2 & 3 Will. 4, c. 98	An Act for regulating the protesting for non-payment of Bills of Exchange drawn payable at a place not being the place of the residence of the drawee or drawees of the same.
6 & 7 Will. 4, c. 58	An Act for declaring the law as to the day on which it is requisite to present for payment to Acceptor, or Acceptors supra protest for honour, or to the Referee or Referees in case of need, Bills of Exchange which have been dishonoured.

SECOND SCHEDULE—*continued*

Session and Chapter.	Title of Act and extent of Repeal.
8 & 9 Vict. c. 37 . in part.	An Act to regulate the issue of bank notes in Ireland, and to regulate the repayment of certain sums advanced by the Governor and Company of the Bank of Ireland for the public service, in part; that is to say, Section twenty-four.
19 & 20 Vict. c. 97 in part.	The Mercantile Law Amendment Act, 1856, in part; that is to say, Sections six and seven.
23 & 24 Vict. c. 111 in part.	An Act for granting to Her Majesty certain duties of stamps, and to amend the law relating to the Stamp Duties, in part; that is to say, Section nineteen.
34 & 35 Vict. c. 74	An Act to abolish days of grace in the case of Bills of Exchange and Promissory Notes payable at sight or on presentation.
39 & 40 Vict. c. 81	The Crossed Cheques Act, 1876.
41 & 42 Vict. c. 13	The Bills of Exchange Act, 1878.

Enactment Repealed as to Scotland

19 & 20 Vict. c. 60 in part.	The Mercantile Law (Scotland) Amendment Act, 1856, in part; that is to say, Sections ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen.
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LIMITATIONS

Statute of Limitations

The periods of limitation for different classes of action are now prescribed by the Limitation Act, 1939 (2 & 8 Geo. 6, c. 21). The period for actions founded on simple contract or tort is six years from the date on which the cause of action accrued (s. 2 (1) (a)). No period applies in respect of any fraud or fraudulent breach of trust to which a trustee was party or privy (s. 19 (1); s. 26). And an action against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority must be commenced within one year of the accrual of the cause of action (s. 21 (1)). S. 22 deals with disability. Any acknowledgment in writing or part payment creates a fresh accrual of action (ss. 28, 24, and 25).

Further, by s. 18 (1) of the Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), no proceedings shall lie for the recovery by a moneylender of any money lent by him or for the enforcement of any agreement made or security taken in respect of any loan made by him unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued. But a new period begins to run if within the period the debtor acknowledges in writing the account due and gives a written undertaking to the moneylender to pay that amount, and time does not run whilst the person entitled to sue is *non compos mentis* or where the debtor is beyond the seas; in the case of payments becoming due from time to time, the period only runs when a cause of action has arisen in regard to the last payment.

Limitation, how computed against the several parties.—Rule 1. Subject to the case provided for by s. 48 (1) of the Bills of Exchange Act and to rule 5, no action on a bill can be maintained against any party thereto after the expiration of six years from the time when a cause of action first accrued to the *then* holder against such party.¹

ILLUSTRATION

C is the holder of a dishonoured bill. Three years after the dishonour he indorses the bill to D. D must sue the acceptor within the next three years, though he (presumably) has six years within which he may sue C.

¹ 2 & 8 Geo. 6, c. 21, s. 2; *Whithead v. Walker* (1842), 9 M. & W. 506; 152 E.R.; *Woodruff v. Moore* (1850), 8 Barb. 171, New York.

Note.—S. 46 (1) saves the rights of a holder in due course who takes a bill dishonoured by non-acceptance without notice of that fact.

By the Limitation Act, 1628 (21 Jac. 1, c. 16, s. 8), all actions of account and upon the case and all actions of debt grounded upon any lending or contract without specialty had to be commenced, and sued within six years next after the cause of such actions and not after. Under this enactment, it was held that any acknowledgment of the debt after it was due was equivalent to a fresh promise to pay it, defeating the statute, and causing it to run only from the date of the acknowledgment.² This doctrine was considerably narrowed by subsequent legislation. See note to Rule 5, p. 298.

It is to be noted that the 3 & 4 Anne, c. 8, which put promissory notes on the same footing as bills of exchange, has been repealed.³ S. 4 of that Act applied the provisions of 21 Jac. 1, c. 16, to promissory notes, but the whole Act was repealed as unnecessary when a legislative definition was given of promissory notes (as is done by section 88), which clearly brought them within the general words of the statute of James.

The repeal of the statute of Anne may, however, have an important bearing on notes made under the seal of a corporation as provided for by s. 91 (2). Such notes might be held to come under 2 & 3 Geo. 6, c. 21, s. 2 (3), which enacts that all actions of covenant or debt upon a specialty shall be commenced and sued within twelve years after the cause of such actions.

There is sometimes a difficulty in proving the fact which sets the statute running. For instance, if a note be payable three months after demand, the statute cannot begin to run till three months after demand be made. If the maker be dead it may be impossible to prove the demand on him. In such cases, after the lapse of a considerable time, a presumption of payment seems to arise independent of the statute.⁴

In calculating the six-year period of limitation it must be noted that, when a debt is payable on a day certain, the debtor has the whole of the day in which to pay, and that no cause of action arises until that day has expired.⁵

Acceptor or maker.—*Rule 2.* As regards the acceptor, time begins to run from the maturity of the bill, unless—

- (1) Presentment for payment is necessary in order to charge the acceptor, in which case time (probably) runs from the date of such presentment⁶; or
- (2) The bill is accepted after its maturity; in which case time (probably) runs from the date of acceptance.⁷

ILLUSTRATIONS

1. Bill payable *in futuro*, e.g., three months after date or sight. Time runs in favour of the acceptor from the maturity of the bill, and not from the day the acceptance is given.⁸

2. Note payable three months after date. The last day of grace is September 22, 1906. If the note is unpaid, the cause of action arises on September 23, and the six-

² *Re River Steamer Co.* (1871), L. R. 6 Ch. App. 822, at p. 828.

³ In Ruffhead's edition of statutes the Act appeared as 3 & 4 Anne, c. 9, and the sections were numbered differently.

⁴ *Re Rutherford* (1880), 14 Ch. D. 687, at p. 691, C. A., where twenty years had

⁵ *Kennedy v. Thomas*, [1894] 2 Q. B. 752, C. A.; *Gelmini v. Moriggia*, [1915] 2 K. B. 549.

⁶ Cf. s. 62.

⁷ Cf. s. 10 (3).

⁸ *Holmes v. Kerrison* (1810), 2 Taunt. 329; 127 H. R.; cf. *Fryer v. Rows* (1852), 12 C. B. 437; 138 E. R. See s. 14 (computation of time of payment).

year period of limitation expires on September 22, 1912. If that day is a Sunday, and the writ is issued on Monday, it is too late.⁹

8. B in 1840 gives a blank acceptance to C. In 1850 it is filled up as a bill payable three months after date, and negotiated to a *bona fide* holder. Time runs in favour of B from the maturity of the bill.¹⁰

4. Note payable on demand (with or without interest), and issued on the day it bears date. Time runs in favour of the maker from the date of the note, and not from the date of demand.¹¹

5. Note payable on demand, dated January 1, is not issued till July 1. Time runs in favour of the maker from July 1, the day of issue.¹²

6. Note payable three months after demand. Time runs in favour of the maker from the time when the bill is payable.¹³

Drawer or Indorser.—*Rule 8.* As regards the drawer or an indorser, time (generally) begins to run from the date when notice of dishonour is received.¹⁴

ILLUSTRATIONS

1. Bill payable ninety days after sight is dishonoured by non-acceptance. As regards the drawer time runs against the holder from the dishonour by non-acceptance and notice thereof. If the bill is presented for payment and again dishonoured, no fresh cause of action arises.¹⁵

2. A bill drawn on B. C indorses it for A's accommodation. The bill is dishonoured, and five years after the dishonour C, as indorser, is obliged to pay the holder. Two years later (i.e., seven years after the dishonour) C sues A on the bill. The action is barred. *Aliter* if C sued A on the implied contract of indemnity.¹⁶

8. C is the indorser of a bill or note payable on demand. Time in ordinary cases does not begin to run in favour of C until demand has been made and notice given.¹⁷ See s. 47.

In England it has been held that the holder's right of action against the drawer or an indorser is complete when notice of dishonour is received¹⁸; when then does the cause of action arise when the notice is delayed or lost in the post? Perhaps from the time when it ought to have been received. In America the balance of authority favours the view that the cause of action is complete when notice of dishonour is sent.¹⁹ In cases where notice of dishonour is unnecessary probably the cause of action arises on dishonour.

A difficulty arises in the case of a bill payable on demand when presentment for payment is excused, and presentment is not made in fact. On principle, it would seem that time should run in favour of the drawer or indorser from the date when the holder was entitled to treat the bill as dishonoured (see s. 46, (2) and s. 47), but the cases are conflicting.²⁰

⁹ *Gelmini v. Mariggia*, [1918] 2 K. B. 549.

¹⁰ *Montague v. Perkins* (1853), 22 L. J. C. P. 187; cf. s. 20.

¹¹ *Norton v. Ellam* (1837), 2 M. & W. 461; 150 E. R.; cf. *Jackson v. Ogg* (1850), Johns. at p. 400; 70 E. R.; *Wheeler v. Warner* (1872), 47 New York R. 519; cf. *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. at p. 37, C. A.; [1918] 2 K. B. 832, distinguishing collateral from direct promises.

¹² *Savage v. Aldren* (1817), 2 Stark. 232; 171 E. R.; cf. *Richards v. Richards* (1831), 2 B. & Ad. 447; 109 E. R.; *Watkins v. Figg* (1868), 11 W. R. 253.

¹³ *Thorp v. Coombe* (1826), 8 D. & R. 347; cf. *Way v. Bassett* (1845), 5 Hare 55; 68 E. R.; *Brown v. Rutherford* (1880), 14 Ch. D. 687, C. A.

¹⁴ *Cl. Castrigue v. Bernabo* (1844), 6 Q. B. 498; and s. 48.

¹⁵ *Whitehead v. Walker* (1842), 9 M. & W. 506; 152 E. R.

¹⁶ *Webster v. Kirk* (1852), 17 Q. B. 944; 117 E. R.; cf. *Woodruff v. Moore* (1850), 8 Barb. 171, New York.

¹⁷ *Cl. Re Brown's Estate*, [1898] 2 Ch. at pp. 304, 305.

¹⁸ *Castrigue v. Bernabo* (1844), 6 Q. B. 498; 115 E. R.

¹⁹ *Daniel*, § 1212; *Shed v. Brett* (1828), 18 Massachus. R. 401.

²⁰ *Cl. Re Bethell* (1887), 34 Ch. D. 561, Stirling, J.; but see *contra Re Boyse* (1886), 38 Ch. D. 612.

Collateral obligations.—*Rule 4.* When an action is brought against a party to a bill, to enforce an obligation collateral to the bill, though arising out of the bill transaction, the nature of the particular transaction determines the period from which time begins to run.

ILLUSTRATIONS

1. B accepts a bill to accommodate the drawer. It is dishonoured, and two years afterwards B is compelled to pay the holder. B sues the drawer on the implied agreement to indemnify. Time runs from the date B was compelled to pay, and not from the maturity of the bill.²¹

2. B authorises A, an agent abroad, to draw upon him for the price of the goods to be shipped to B. B dishonours a draft so drawn, and A is compelled to take it up. A can sue B on an implied contract to indemnify. Time runs from the date when A was compelled to pay.²²

3. A, intending to lend C £50, draws a cheque in C's favour for that sum. A sues C to recover the loan. Time runs from the date when the cheque was cashed.²³

See note, p. 195, distinguishing a right of action on a bill from a right of action which a party to a bill may have arising out of the bill transaction but independent of the instrument.

Foreign laws and conflict of laws.—In France the period of limitation is five years, and the time, it seems, begins to run against acceptor, drawer, and indorsers from the day of protest.²⁴ By German Exchange Law, Art. 77, the limitation as regards the acceptor is three years, starting from the maturity of the bill; but as regards the drawer or indorsers, it is three months, starting from the day of protest if the drawer or indorser live and the bill be payable in Europe. Where laws conflict as to time of limitation, and the limitation, as in England, merely bars the remedy, the *lex fori* governs.²⁵ *Aliter* probably when lapse of time operates as a discharge.

Statute, how defeated.—*Rule 5.* Any circumstance which postpones or defeats the operation of the Limitation Act in the case of an ordinary contract acts in like manner in the case of a bill.

By 9 Geo. 4, c. 14, no indorsement or memorandum of any payment written or made upon a bill by or on behalf of the party to whom such payment was made was sufficient proof of such payment so as to take the case out of the statute.²⁶

ILLUSTRATIONS

1. The holder of an accepted bill dies intestate before its maturity. The statute does not begin to run until an administrator is appointed.²⁷

2. The holder of a bill at the time of its dishonour is a minor or a lunatic. The statute does not begin to run against such holder until the disability ceases.²⁸

²¹ *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; 138 E. R.; *Angrove v. Tippet* (1865), 11 L. T. 708; but cf. *Coppin v. Gray* (1842), 11 L. J. Ch. 105, as to a premature payment; see *Davies v. Humphreys* (1840), 6 M. & W. 158; 151 E. R. (contribution among co-makers).

²² *Huntley v. Sanderson* (1886), 1 Cr. & M. 467; 149 E. R.

²³ *Garden v. Bruce* (1868), L. R. 3 Q. B. 800.

²⁴ French Code, Art. 189; Nonguiet, § 1605.

²⁵ *Don v. Lippmann* (1887), 5 Cl. & F. 1; 7 E. R., H. L.

²⁶ S. 8 (this was before the Evidence Act, 1851, by which the parties to an action are enabled to give evidence). Repealed by 2 & 3 Geo. 6, c. 21, Sched.

²⁷ *Murray v. East India Co.* (1821), 5 B. & Ald. 204; 106 E. R.; see conversely *Maxwell v. Tuhill* (1878), 1 L. L. R. Ch. 280 (death of acceptor intestate).

²⁸ 2 & 3 Geo. 5, c. 21, s. 22; *Scarpellini v. Atchason* (1845), 7 Q. B. 864; 115 E. R.

8. Note payable on demand, no mention of interest being made in it. Proof that interest has been paid takes the note out of the statute.²⁹

4. Note payable on demand with interest. Four years after its issue the holder sues the maker for interest and recovers. Three years later (i.e., seven years after issue of note) the holder sues the maker on the note. The action is barred.³⁰ *Aliter* if the payment of interest had been voluntary.

5. Note payable three months after demand. Interest is paid on it, as appears from indorsement on the back of the note. This is evidence of a demand, and the statute begins to run from the first payment of interest.³¹

6. An acknowledgment in writing signed by the party sought to be charged defeats the operation of the statute e.g., the maker of a note twenty years after its maturity signs his name on the back, and adds the date. The holder can sue the maker within six years after this acknowledgment.³²

7. A note is indorsed away by the payee for value. Subsequently the maker, not knowing of the indorsement, makes a payment on account to the payee. This payment does not take the case out of the statute.³³

8. A cheque is given in part payment of a debt, and is duly honoured. The statute runs as to the balance of the debt from the time the cheque was given, and not from the time when it was paid.³⁴

A debt may be taken out of the Limitation Act in two ways: (1) by a written acknowledgment of the debt after it has become due, and (2) by a payment on account of principal or interest.

Before Lord Tenterden's Act (9 Geo. 4, c. 14) a bare verbal acknowledgment was sufficient. By s. 1 of that Act, as it was amended by s. 18 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97),³⁵ the acknowledgment had to be in writing, and signed by the debtor or his authorised agent, and had to be in such terms as to indicate a promise to pay. "To take the case out of the statute", says Mellish, L.J., "either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."³⁶ A written promise to pay any balance which may be found to be due when an account is taken is a sufficient promise to take the case out of the statute.³⁷

Lord Tenterden's Act, which required the acknowledgment to be in writing, expressly provided that nothing therein contained should "alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever" (9 Geo. 4, c. 14, s. 1). "The principle", says Blackburn, J., "laid down as to an acknowledgment, has been applied in all cases upon part payment, namely, that it must be such that a promise [to pay] may be inferred in fact, not merely implied in law."³⁸

By 9 Geo. 4, c. 14, s. 1, as amended by 19 & 20 Vict. c. 97, s. 14,³⁹ an acknowledgment or part payment by one co-debtor or co-contractor did not prevent the

²⁹ *Bamfield v. Tupper* (1851), 7 Exch. 27; 155 E. R.

³⁰ *Morgan v. Rowlands* (1872), L. R. 7 Q. B. 498; see also *Harding v. Edgcombe* (1859), 28 L. J. Ex. 815 (payment by agent).

³¹ *Brown v. Rutherford* (1880), 14 Ch. D. 687, C. A.

³² *Bourdin v. Greenwood* (1871), L. R. 18 Eq. 281. See as to acknowledgments, *Re River Steamer Co.* (1871), L. R. 6 Ch. at p. 828, Mellish, L.J.; *Chasemore v. Turner* (1875), L. R. 10 Q. B. 600, Ex. Ch.; *Parson v. Nesbitt* (1915), 60 S. J. 69.

³³ *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765, C. A.

³⁴ *Marreco v. Richardson*, [1908] 2 K. B. 584, C. A.

³⁵ Both provisions are now repealed by 2 & 3 Geo. 6, c. 21.

³⁶ *Re River Steamer Co. (Mitchell's Claim)* (1871), L. R. 6 Ch. App. 822, at p. 828; cf. the test proposed by Bowen, L.J., in *Green v. Humphreys* (1884), 26 Ch. D. 474, at p. 479, C. A.

³⁷ *Langrish v. Watts* (1903), 79 L. J. K. B. 435, C. A.

³⁸ *Morgan v. Rowlands* (1872), L. R. 7 Q. B. 498, at p. 498; cf. *Davies v. Edwards* (1851), 7 Exch. 22, at p. 25; 155 E. R., *per Parke, B.*

³⁹ Both provisions are now repealed by 2 & 3 Geo. 6, c. 21.

statute from running in favour of the other or others,⁴⁰ and by section 10 of the latter Act, the absence of the plaintiff beyond the seas, or his imprisonment, did not prevent the statute from beginning to run.⁴¹

Where the statute begins to run, no supervening disability stops it. It is clear then that if a dishonoured bill be indorsed to an infant the time still runs on.⁴² On the other hand, if the holder of a bill at the time of dishonour be an infant, and he subsequently indorse it while still an infant to an adult, it is conceived that the statute runs from the indorsement in favour of the parties liable on the bill. It seems that an acknowledgment to the holder enures for the benefit of a subsequent holder⁴³; but an acknowledgment to a previous indorser, who at the time does not hold the bill, is ineffectual.⁴⁴

⁴⁰ Cf. *Bradford Old Bank v. Sutcliffe* (1818), 24 Com. Cas. at p. 86, C. A. By s. 25 (6) of 2 & 3 Geo. 6, c. 21—"A payment in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof." This is subject to the immediate proviso that if the payment is in respect of a debt already statute barred the payment shall only bind the payer and his successors in title. S. 25 (5) provides that an acknowledgment of a debt binds the acknowledgor and his successors but no other persons.

⁴¹ Now repealed by 2 & 3 Geo. 6, c. 21, which makes no provision for such cases.

⁴² *Rhodes v. Smethurst* (1840), 6 M. & W. 951; 151 E. R., Ex. Ch.

⁴³ Byles, 19th ed., p. 802; cf. *Cripps v. Davis* (1848), 12 M. & W. 159; 152 E. R.

⁴⁴ *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765.

SECURITIES FOR BILLS OF EXCHANGE

Rights of Drawer

Drawer's lien as unpaid vendor.—*Rule 1.* Apart from special contract,—

(1) Where goods are sold, to be paid for by buyer's acceptance of seller's draft, and the acceptor fails or dishonours the bill, the lien of the drawer as unpaid vendor thereupon revives, if he has not parted with the possession of the goods; if he has, he can stop them in transitu; and it is immaterial that the drawer has negotiated the bill.¹

(2) Where an agent buys goods for his principal, and draws on the principal for the price, his rights, in this respect, are the same as those of an ordinary vendor.²

It is essential to distinguish between the sale of goods to the acceptor, where the property in them vests absolutely in him, subject only to the vendor's lien until they reach his possession, and the case of goods which are sent to the acceptor as cover for the bill, where there is a kind of mixed property in the goods, both drawer and acceptor having a defeasible interest therein.³ The rights and duties of a commission merchant who buys for a foreign principal are explained by Lord Blackburn in *Ireland v. Livingston*.⁴

Rule 2. Where the drawer of a bill remits goods or securities to the drawee as cover for the bill, and in consequence of the drawee's failure is obliged to take up the bill, he is entitled to the return of any such goods or securities as the drawee may hold unrealised at the time of his failure.⁵

Rights of Drawer or Acceptor

Right or lien of acceptor.—*Rule 3.* Where the drawer of a bill of exchange remits goods or securities to the drawee as cover for it, and the drawee accepts, he thereby acquires a lien upon or right to the

¹ *Gunn v. Bolokow, Vaughan & Co.* (1875), L. R. 10 Ch. 491; cf. *Ex p. Chalmers* (1875), L. R. 8 Ch. at p. 292; *Ex p. Lambton* (1875), L. R. 10 Ch. at p. 415; *Re Rankin*, [1927] N. L. 162 (hire-purchase agreement); Sale of Goods Act, 1898 (56 & 57 Vict. c. 71), s. 88.

² *Ex p. Banner* (1876), 2 Ch. D. at p. 287, O. A.; cf. *Ex p. Gomez* (1875), L. R. 10 Ch. at p. 645.

³ *Ibid.* See, too, *Ex p. Lambton* (1875), L. R. 10 Ch. at p. 415.

⁴ *Ireland v. Livingston* (1872), L. R. 5 H. L. at p. 408. As to "sale" of a bill, with bill of lading attached, to a bank where the bill is not accepted, see *The Ortheria*, [1920] A. C. 724, at p. 733, P. O.

⁵ Cf. *Re Broad, ex p. Neak* (1884), 18 Q. B. D. 740, O. A.; *Ex p. Dever* (No. 2) (1885), 14 Q. B. D. 611, at p. 622, per Cotton, L.J., O. A.; and see Rule 4.

goods or securities.⁶ If the drawee do not accept he has no right to or lien upon the goods and securities.⁷

ILLUSTRATIONS

1. A consigns goods to B, and draws on him for the price. A sends the bill of lading and bill of exchange to his own agent, who forwards them to B, requesting him to accept the bill. If B do not accept the bill of exchange he cannot retain the bill of lading.⁸

2. A, the principal, sends goods to B, his agent, on the terms that B is to sell the goods, receiving a commission, and to accept A's drafts in proportion to the goods sent, and if the proceeds of the goods do not cover the acceptances in full, A is to remit the difference. B accepts for £200. Before the bill matures A, the drawer, fails. B has a lien on the goods to the extent of £200.⁹

3. A consigns goods to B for sale, draws on him for the price, and negotiates the bill of exchange with bill of lading attached. B accepts the bill, payable on delivery of bill of lading. B fails before the bill matures. This operates as a pledge of B's interest in the goods to the holder, who becomes, as regards B, a secured creditor.¹⁰

4. An English accepting house undertakes for a commission to finance shipments from Chile to a firm in Germany. A cargo is sold to the German firm, and the seller draws on the English house for the price, and sends the bill of lading to the English house, which accepts and pays the bill of exchange. While the cargo is at sea war breaks out with Germany, and the cargo is captured by an English cruiser. It is condemned as prize, because it is German property. The English house has only the rights of a pledgee, and those rights are not recognised by the Prize Court.¹¹

5. Goods are consigned for sale from A in America to B in England. The consignor draws on B for the price, and discounts the bill with the bill of lading attached. The property in the goods *prima facie* passes to B when he receives the bill of lading and accepts the bill of exchange.¹²

Lord Cairns pointed out in *Banner v. Johnston*,¹³ that where a bill is only allowed to be drawn against shipments or against bills of lading, the stipulation is for the assurance and protection of the drawee, and not for the benefit of the holder. In France, it seems, the property in the goods would pass with the bill. See *Nougues*, § 715, and Belgian Code, Art. 26.

The ordinary rights of the parties may, of course, be varied by the terms of the credit under which the bill is drawn, and the real relations of the parties. For example, when a documentary bill is accepted the acceptor may be the buyer of the goods, or the drawer's agent for sale, or he may be accepting the bill to finance a third party who is the real buyer.¹⁴

⁶ *Ex p. Brett* (1871), L. R. 6 Ch. at p. 841; *Ex p. Oriental Bank Corporation* (1874), 30 L. T. 808, C. A.; *Re Pavy's Patent Fabric Co.* (1876), 1 Ch. D. 681; *Lutscher v. Comptoir d'Escompte* (1876), 1 Q. B. D. 709; cf. *Ex p. Banner* (1876), 2 Ch. D. at p. 287, C. A.; see, too, *Steele v. Stuart* (1866), L. R. 2 Eq. 84.

⁷ *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116; see, at p. 133, per Lord Cairns, and the comment on this case in *Ex p. Banner* (1876), 2 Ch. D. at p. 288, C. A.; see, too, *Torrance v. Bank of British America* (1878), L. R. 5 P. C. 246; and Sale of Goods Act, 1899 (56 & 57 Vict. c. 71), s. 19 (3); *Barton, Thompson & Co. v. Vigers Brothers* (1906), 19 Com. Cas. 175; distinguished *Jardeson & Co. v. London Hardwood Co.* (1906), 19 Com. Cas. at p. 179 (action by agent when principal ought to have sued).

⁸ *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116.

⁹ *Re Pavy's Patent Fabric Co.* (1876), 1 Ch. D. 681; see, *passim*, *Ex p. Dickin* (1878), 8 Ch. D. 877.

¹⁰ *Ex p. Brett* (1871), L. R. 6 Ch. at p. 841.

¹¹ *The Odessa*, [1916] A. C. 145, P. C. The only remedy of the English house is an appeal to the bounty of the Crown.

¹² *The Prinz Adelbert*, [1917] A. C. 586, P. C.

¹³ (1871), L. R. 5 H. L. at p. 174.

¹⁴ As to measure of damages when the third party does not recoup the acceptor, see *Re Ludwig Tiltman* (1918), 34 T. L. R. 322.

By s. 19 (3) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), "Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him"; and see s. 38 (1) of that Act (seller's lien).

Effect of acceptor's failure.—*Rule 4.* If the acceptor fails during the currency of the bill or dishonours it at maturity, his lien upon or right to the goods or securities is thereby determined, and he holds them at the disposition of the drawer.¹⁵

ILLUSTRATIONS

1. A draws on B, and remits to B bills of other parties which he holds to provide B with funds. B accepts, fails before his acceptances mature, and compounds, paying the bill-holders 5s. in the pound. If B realises the bills sent him as cover, A is entitled to the balance of the proceeds of such bills as were in specie at the time of the failure, after deducting the actual amount paid by B on his acceptances.¹⁶

2. An agent buys goods for his principal, remits them to him, and draws on him for the price. The principal accepts the bill, but fails before it matures. The property in the goods does not revert in the drawer, for the goods are the principal's absolutely.¹⁷

3. A bill for £400 is accepted to accommodate the drawer. The drawer forwards to the acceptor the bill of a third party for £400 to provide for the acceptance. The acceptor discounts the remitted bill, being entitled to do so by the course of dealing, and fails before his acceptance matures. The drawer is not entitled to the proceeds of the remitted bill.¹⁸

4. A, in America, consigns cheese to a factor in England, and draws on him a bill running: "Pay to the order of C £1,000, and charge the same to account of cheese, per *Britannic*, as advised". The same day A writes to the factor, enclosing bills of lading for the cheese, and saying: "Against these we value on you in favour of C". A, the drawer, fails, and the factor refuses to accept. C, the bill-holder, has no claim on the goods.¹⁹ They belong to the drawer's trustee.

The case of *Brown v. Kough*²⁰ seems finally to dispose of the often discredited case of *Frith v. Forbes*,²¹ by treating it as an erroneous finding on a question of fact. As Mellish, L.J., says in *Robey v. Ollier*²²: "A mercantile man who is intended to have a lien on a cargo expects to have a bill of lading annexed (to the bill of exchange); if there is no bill of lading annexed, he only expects to get the security of the bill itself. In *Frith v. Forbes* the Court considered that, taking all the letters together, there was an equitable assignment (in favour of the bill-holder)".

¹⁵ *Tooke v. Hollingworth* (1798), 5 T. R. 215; 101 E. R.; approved *Ex p. Banner* (1876), 2 Ch. D. at p. 289, C. A.; *Ex p. Kelly & Co.* (1879), 11 Ch. D. 306, C. A.; *Re Gothenburg Commercial Co.* (1881), 29 W. R. 868, C. A.; cf. *Ex p. Smart* (1872), L. R. 8 Ch. App. at p. 224.

¹⁶ *Ex p. Gomez* (1875), L. R. 10 Ch. 689.

¹⁷ *Ex p. Banner* (1876), 2 Ch. D. 278, C. A.; see at p. 289; see *Banco de Lima v. Anglo-Peruvian Bank* (1878), 8 Ch. D. 160.

¹⁸ *Re Broad, ex p. Neck* (1884), 18 Q. B. D. 740, C. A.; cf. *Ex p. Dever, re Suse* (1884), 13 Q. B. D. 786, C. A.; *aliter*, it seems, if the security were in specie at the time of failure.

¹⁹ *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848, C. A.; cf. *Phelps v. Gombel* (1885), 29 Ch. D. 818, C. A.

²⁰ *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848, C. A.

²¹ (1862), 4 De G. F. & J. 409; 45 E. R.

²² (1872), L. R. 7 Ch. at p. 699.

Where remittances are made to cover bills, and the drawer by a collateral agreement has assigned his rights to a particular holder, the acceptor holds the remittances for the benefit of that holder as equitable assignee.²³

Rights of Holder

Bill not an assignment of funds.—Rule 5. Although the drawee or acceptor of a bill is indebted to, or has in his hands funds of the drawer sufficient to meet it, the bill does not operate as an assignment of the debt or funds in favour of the holder.²⁴

Such an assignment can only be effected by agreement extraneous and collateral to the bill.²⁵

ILLUSTRATIONS

1, A, having a fund in B's hands, draws on B a bill for the exact amount of the fund. This does not operate as an assignment of the fund to the payee.²⁶

2 The holder of a bill purchases it on the faith of a verbal representation made by the drawer that funds sufficient to meet it have been remitted to the drawee, that it is drawn against those funds, and that it certainly will be paid. The drawer fails, and the drawee refuses to accept the bill, though he has funds sufficient to meet it. The bill holder is not entitled to those funds, and the drawee is justified in handing them over to the drawer's trustees.²⁷

This rule does not apply to Scotland. See s. 58

Bill drawn against specific goods.—Rule 6. Subject to Rule 7 (double insolvency), where a bill of exchange is on the face of it expressed to be drawn against specific goods or securities, the holder does not obtain thereby any charge upon the goods or securities if the bill be dishonoured.²⁸

Such charge can only be created by agreement collateral to the bill, and in favour of the person with whom the agreement is made,²⁹ or (perhaps) by the terms of a conditional acceptance.³⁰

ILLUSTRATIONS

1 Under a credit, No. 20, a consignor of cotton is entitled to draw on the consignee "against cotton purchased according to instructions" The consignee

²³ *Ex p. Carrick* (1858), 2 De G. & J. 208; 44 E. R.

²⁴ See s. 58, and *Shand v. Du Buisson* (1874), L. R. 18 Eq. 283 (bill); *Hopkinson v. Forster* (1874), L. R. 19 Eq. 74 (cheque); *Schroder v. Central Bank* (1876), 84 L. T. 735 (cheque).

²⁵ *Thomson v. Simpson* (1870), L. R. 5 Ch. 659; *Citizens' Bank of Louisiana v. New Orleans Bank* (1878), L. R. 6 H. L. 852; see at pp 860 and 866.

²⁶ *Shand v. Du Buisson* (1874), L. R. 18 Eq. 283.

²⁷ *Citizens' Bank of Louisiana v. New Orleans Bank* (1878), L. R. 6 H. L. 852.

²⁸ *Inman v. Clare* (1858), Johns. R. at p. 776, 70 E. R.; *Robey v. Oliver* (1872), L. R. 7 Ch. 695, at p. 698.

²⁹ *Ibid.*; see *Ex p. Imbert* (1857), 1 De G. & J. 152; 44 E. R.; *Ex p. Carrick* (1858), 2 De G. & J. 208; *Ranken v. Alfaro* (1877), 5 Ch. D. 786, Q. A., where the holder's charge has been upheld; and *Latham v. Chartered Bank* (1874), L. R. 17 Eq. 205, for the construction of a letter of hypothecation.

³⁰ *Ex p. Brett* (1871), L. R. 8 Ch. 841, Q. A.

accepts a draft expressed to be drawn "against credit, No 20", receives the cotton, but fails before the bill matures, and dishonours it. The holder has no charge on the cotton.³¹

2 A consigns by ship *Acacia* a cargo to B, and draws a bill on B running, "Pay to my order £100, which place to account cargo per *Acacia*." B promises A to protect the draft. An indorsee has no charge on the cargo if B refuses to accept the bill.³²

3 A in India sells and ships cotton to B in England, and draws for the price a bill running, "Pay C on order £1,000, and place the same to account cotton shipments as advised." B promises the drawer to protect the bill, accepts it, and gets the bills of lading. Before the bill matures, B fails, and A's English house takes it up. The English house has no charge on the cotton.³³

4. Bills are drawn under a credit against specific consignments. By the terms of the credit, which is shown to the holder, the bills are to be accompanied by bills of lading which are to be surrendered to the drawee on acceptance. If the acceptor fails, the bill holder has no claim on the consignments or their proceeds.³⁴

See, further, Illustration 4 to Rule 4 and the note at the end of that rule. The holder of a documentary bill who in good faith presents it for acceptance or payment is not responsible for the authenticity of the documents attached.³⁵

Double insolvency of parties liable.—*Rule 7.* Where the estates of two insolvent³⁶ parties both liable to the holders of bills of exchange³⁷ are administered under the control of a Court of justice,³⁸ and one of those parties holds goods or securities of the other³⁹ as cover for the bills,⁴⁰ the holders are entitled to have the proceeds of those goods and securities applied in payment of the bill,⁴¹ provided that the goods or securities remained unrealised at the time of the failure of the party holding them.⁴²

If the proceeds of the goods and securities do not equal the amount of the bill, the holders are entitled to prove as creditors for the balance.⁴³

³¹ *Banner v. Johnston* (1871), L. R. 5 H. L. 157.

³² *Robey v. Ollier* (1872), L. R. 7 Ch. 695.

³³ *Ex p. Arbuthnot* (1876), 3 Ch. D. 477, C. A.

³⁴ *Ex p. Dever, re Suse* (1884), 18 Q. B. D. 766, C. A. The appropriation is for benefit of drawee, not holder.

³⁵ *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K. B. 623, C. A.

³⁶ *Hicks's Case* (1867), L. R. 4 Eq. 226.

³⁷ *Vaughan v. Halliday* (1874), L. R. 9 Ch. App. 561.

³⁸ *Powles v. Hargreaves* (1853), 23 L. J. Ch. 1.

³⁹ *Ex p. Lambton* (1875), L. R. 10 Ch. App. 405, see at pp. 416, 417; *Ex p. Banner* (1876), 2 Ch. D. at p. 287, C. A., and see *Banner v. Johnston* (1871), L. R. 5 H. L. at p. 174.

⁴⁰ *Levi & Co.'s Case* (1869), L. R. 17 Eq. 449; *Ex p. Alliance Bank* (1869), L. R. 4 Ch. App. 423.

⁴¹ *Ex p. Waring* (1815), 19 Ves. 345; *Ex p. Parr* (1818), Buck. 191; *City Bank v. Luokie* (1870), L. R. 5 Ch. App. 778; *Bank of Ireland v. Perry* (1871), L. R. 7 Ex 14; *Ex p. Dewhurst* (1878), L. R. 8 Ch. App. 695.

⁴² *Ex p. Dever, re Suse* (No. 2) (1885), 14 Q. B. D. 611, C. A.; *aliter*, if realised rightfully or wrongfully; per Brett, M.R., at p. 622.

⁴³ *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430; see at p. 452, and form of order at p. 445; 43 E. R.; also form of decree in *City Bank v. Luokie* (1870), L. R. 5 Ch. App. at p. 778; *Ex p. Joint Stock Discount Co.* (1875), L. R. 10 Ch. App. 196 (reduction of proof). *Quare*, if *Loder's Case* (1868), L. R. 6 Eq. 491, be right.

ILLUSTRATIONS

1. The drawer and acceptor of a bill both become bankrupt. The acceptor holds short bills belonging to the drawer as cover for his acceptance. The holder is entitled to the proceeds of these bills when realised.⁴⁴

2. The drawer of a bill becomes bankrupt. The acceptor dies insolvent. By agreement with the acceptor the drawer holds certain goods as security for the amount of the bill. The holder is entitled to the proceeds of these goods.⁴⁵

3. The drawer and acceptor of a bill become bankrupt. The acceptor accepted under a guarantee from a bank that the drawer should provide funds to meet the bill and keep him out of cash advance. The holder is not entitled to the benefit of the guarantee.⁴⁶

4. The drawer and acceptor of a bill become bankrupt. The acceptor holds securities which were deposited by the drawer as security for his current account, before the bill was drawn, and without reference to it. The holder is not entitled to the benefit of those securities.⁴⁷

5. The drawer and acceptor of a bill, who are distinct firms in India and England respectively, but engaged in a joint adventure, become bankrupt. The bill is drawn specifically against a consignment of goods from the drawer to the acceptor. The holder is entitled to the proceeds of the consignment, subject to claims of the aggregate creditors of the two firms against the aggregate assets.⁴⁸

6. The drawer and acceptor of a bill become bankrupt, the drawer having sold goods to the acceptor and drawn on him for the price according to agreement. The holder is not entitled to the proceeds of the goods.⁴⁹

7. The drawer and acceptor of a series of bills become bankrupt. According to the terms of the credit under which the bills are drawn, securities are remitted as cover for specific bills. The bill-holders are entitled to the benefit of the securities which remain unrealised in the hands of the acceptor at the time of his failure. The securities must be appropriated for the benefit of the holder of the bill they were remitted to cover, and not for the benefit of the holders of other bills drawn under the same credit.⁵⁰

The rule above stated is generally known as the rule or doctrine of *Ex p. Waring*. It has been much misunderstood. The principle on which it is founded is the necessity of working out the equities between the two insolvent estates, each of which has a claim on the goods or securities forming the cover for the bill, which can only be satisfied by the application of the proceeds to meet the bill. It is not founded on, nor does it imply any property or interest in, the goods or securities on the part of the bill-holder. See *per* Lord Cranworth and Turner, L.J.,⁵¹ *per* Lord Hatherley,⁵² *per* Lord Cairns,⁵³ *per* James, L.J.⁵⁴

The rule in *Ex p. Waring* is a rule *positivi juris*, peculiar to English law. It embodies no universal principle of equity, and does not extend to Scotland.⁵⁵ See the rule criticised by Lord Selborne.

Explanation 1.—Each of the insolvent parties must be liable to the bill-holder in respect of the bill transaction, but it is not necessary that both of them should be liable as parties to the bill.⁵⁶

⁴⁴ *Ex p. Waring* (1815), 19 Ves. 345.

⁴⁵ *Powles v. Hargreaves* (1853), 8 De G. M. & G. 430; 43 E. R.

⁴⁶ *Ex p. Stephens* (1868), L. R. 8 Ch. App. 753.

⁴⁷ *Levi & Co.'s Case* (1869), L. R. 7 Eq. 449.

⁴⁸ *Ex p. Dewhurst* (1873), L. R. 8 Ch. App. 965; cf. *Ex p. Manchester Bank* (1879), 12 Ch. D. at 779.

⁴⁹ *Ex p. Lambton* (1875), L. R. 10 Ch. App. 405.

⁵⁰ *Ex p. Dever, re Suse* (No. 2) (1886), 14 Q. B. D. 611, C. A.

⁵¹ *Powles v. Hargreaves* (1853), 8 De G. M. & G. at 447, 453; 44 E. R.

⁵² *City Bank v. Luckie* (1870), L. R. 5 Ch. App. at 776.

⁵³ *Banner v. Johnston* (1871), L. R. 5 H. L. at 174.

⁵⁴ *Vaughan v. Halliday* (1874), L. R. 9 Ch. App. at 567.

⁵⁵ *Royal Bank of Scotland v. Commercial Bank* (1882), 7 App. Cas. 366, H. L.

⁵⁶ *Vaughan v. Halliday* (1874), L. R. 9 Ch. App. at 568.

ILLUSTRATIONS

1. A bill is drawn specifically against a consignment of goods. Drawer and drawee both become bankrupt, and the drawee refuses to accept. The holder is not entitled to the proceeds of the goods.⁵⁷

2. A in Scotland employs S as his correspondent at Havannah, and B as his correspondent in London. A sends goods to S, and by arrangement between all parties, draws on B for the price. B accepts. S sends remittances in bills to B to cover his acceptance. S and B become bankrupt. A is entitled to claim that the proceeds of the remittances be used to liquidate B's acceptance.⁵⁸

Explanation 2.—It is not necessary that the two insolvent estates should be administered in bankruptcy. It is sufficient that they are both administered for the benefit of creditors under the control of a Court of justice.⁵⁹

The term generally used is that both insolvent estates must be under a "forced administration".⁶⁰

It is possible that where a debtor enters into a composition with his creditors under the Bankruptcy Act, 1914, his estate is sufficiently administered under the control of a Court of justice to allow the doctrine of *Ex p. Waring* to apply.⁶¹ Under section 84 and Sched. I of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), the rules in bankruptcy as to debts and liabilities are applied to the administration of the estates of persons who have died insolvent. As to the application of bankruptcy rules to winding up insolvent companies, see ss. 262, 268 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 28).⁶²

Rights of Surety on Bill

Right of surety compelled to pay to securities.—*Rule 8.* (1) Where a bill, which was accepted for value, is dishonoured, and the drawer or an indorser is compelled to pay it, he is entitled to the benefit of any securities deposited by the acceptor with the holder to secure the payment of the bill which the holder had in his possession at the time of the dishonour of the bill.⁶³

When a bill is accepted for value the drawer and indorsers are *quasi* sureties for the acceptor (see p. 179). See the limits of the relationship discussed by Lord

⁵⁷ *Ibid.*

⁵⁸ *Ex p. Smart* (1872), L. R. 8 Ch. App. 220.

⁵⁹ *Powles v. Hargreaves* (1858), 3 De G. M. & G. 430, at 451, 458; 43 E. R.; *Hickie's Case* (1887), L. R. 4 Eq. 226; *Ex p. General South American Co.* (1875), L. R. 10 Ch. App. 695; *Ex p. Gomez* (1875), L. R. 10 Ch. App. at 647, 648.

⁶⁰ *Ex p. Dever* (No. 2) (1886), 14 Q. B. D. 611, at pp. 621, 625, C. A.

⁶¹ Cf. *Ex p. Gomez* (1875), L. R. 10 Ch. App. at 648; and see the status of a composition discussed in *Ex p. Rumball* (1871), 6 Ch. App. 842, and *Gray v. McGrath* (1874), L. R. 9 O. P. at 280.

⁶² As to insolvent companies, see *Hickie's Case* (1887), L. R. 4 Eq. 226.

⁶³ *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, H. L., overruling C. A.; see *First National Bank v. Word* (1877), 71 New York E. 405; *Aga Ahmed v. Judith Crisp* (1891), 19 Ind. App. 24, P. C. (right of indorser paying note to title-deeds deposited with holder).

Blackburn and Lord Watson.⁶⁴ And see the whole subject discussed under the head of Principal and Surety, p. 216.

(2) Where an accommodation party is compelled to pay a bill, he is entitled to the benefit of any securities deposited by the person accommodated with the holder as security for the payment of the bill.⁶⁵

⁶⁴ *Duncan, For & Co. v N. & S. Wales Bank* (1880), 6 App. Cas. 1 at pp. 19 and 22.

⁶⁵ *Bechervaise v. Lewis* (1872), L. R. 7 C. P. at p. 377, *per* Willes, J.; *Gray v. Seckham* (1872), L. R. 7 Ch. 680; *cf. Pearl v. Deacon* (1857), 1 De G. & J. 461; 44 B. R.

PAYMENT BY BILL, NOTE, OR CHEQUE

General rule as to payment.—The general rule of English law is that when a debt becomes due, it is the duty of the debtor, in the absence of any different agreement, to seek out his creditor, if in England, and tender him the exact amount of his debt in cash or other legal tender.¹

On the one hand the debtor is under no obligation to honour a bill drawn on him by a creditor, unless he has agreed to do so, pp. 177, 252; and a creditor is under no obligation to receive a bill, note, or cheque in discharge of his debt. Consequently an authority to an agent to receive a payment due to his principal is not in itself an authority to receive it by bill or cheque.² Tender of a cheque or other negotiable instrument is good tender if the creditor objects only to the *amount*, and not to the quality or form of the tender.³

If an acceptance is to be taken in payment for goods or discharge of a debt it is the duty of the creditor to draw a bill on a proper stamp and present it for acceptance.⁴

Where a creditor has taken a bill or note from his debtor various questions may arise as to the effect of his so doing. A bill or note may be given by a debtor to his creditor either by way of payment or as collateral security; but the presumption is in favour of payment.⁵

¹ Cf. *Fessard v. Mugner* (1885), 34 L. J. C. P. 126; *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. at pp. 30, 37, C. A. As to requiring change, see *Robinson v. Cook* (1815), 6 Taunt. 386; 128 E. R., and cf. *Dean v. James* (1883), 4 B. & Ad. 546; 110 E. R. As to legal tender in coin, see the Coinage Act, 1870 (33 & 34 Vict. c. 10). As to payment *post diem*, see *Beaumont v. Greathead* (1846), 2 C. B. 494. As to currency notes, see p. 381.

² *Williams v. Evans* (1866), L. R. 1 Q. B. 352 (auctioneer); *Blumberg v. Life Interests Corporation*, [1896] 1 Ch. 171; affirmed, [1897] 1 Ch. 27, C. A. (solicitor). Cf. *International Sponge Co. v. Andrew Watts & Sons*, [1911] A. C. 279, H. L. (payment by cheque requested, agent taking cash and stealing the money); *Bradford & Sons v. Price* (1928), 92 L. J. K. B. 871 (payment by cheque to agent only authorised to receive cash).

³ *Polglass v. Oliver* (1831), 2 Cr. & J. 15; 149 E. R.; *Caine v. Coulton* (1868), 1 H. & C. 764; 158 E. R. (bank post bill). See, too, as to a cheque, *Papé v. Westacott*, [1894] 1 Q. B. 272, C. A.; *Meyer v. Sea Hal Banking Co.*, [1913] A. C. 847, P. C. (cheque given by bank in exchange for money paid in).

⁴ Cf. *Bullen and Leake, Precedents of Pleading*, 8th ed., p. 782.

⁵ *Re Boys* (1870), L. R. 10 Eq. 487; cf. *Attenborough v. Clarke* (1856), 27 L. J. Ex. 138, *i.e.*, as conditional payment (see next page).

Collateral security.—If it is given by way of collateral security it does not suspend the creditor's right to sue for his debt. The creditor must use due diligence to collect it and give notice of dishonour, if necessary; otherwise it may be treated as so much money in his hands.⁶

Conditional payment.—Where a bill or note is given by way of payment, the payment may be absolute or conditional, the strong presumption being in favour of conditional payment.⁷ It is immaterial whether the instrument is payable on demand or at a future time. "The title of a creditor", says Lush, J., "to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realised. This is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person."⁸

In some American States (*e.g.*, Massachusetts and Vermont) the common law presumption is reversed, and a bill or note is *prima facie* deemed to have been taken as absolute and not as conditional payment; but the English rule prevails in most States.⁹

The effect of a bill or note as conditional payment may be illustrated by the contract of sale. If a bill be taken for the price of goods sold, the seller's lien is gone during the currency of the bill, but revives on its actual or practical dishonour. Thus, in *Gunn v. Bolckow, Vaughan & Co.*, where iron rails were sold to be paid for by buyer's acceptances of sellers' drafts against wharfinger's

⁶ *Peacock v. Fursell* (1868), 32 L. J. C. P. 286.

⁷ *Cf. Maillard v. Argyle* (1843), 6 M. & Gr. 40; 184 E. R.; *Leake v. Young* (1856), 25 L. J. Q. B. 286; *Bottomley v. Nuttall* (1868), 28 L. J. C. P. 110.

⁸ *Currie v. Misa* (1875), L. R. 10 Eq. 153, at p. 168, Ex. Ch.; see *Crowe v. Glay* (1854), 9 Exch. 804, at p. 808; 158 E. R., Ex. Ch.; *Marreco v. Richardson*, [1908] 2 K. B. at p. 592, G. A.; *Allen v. Royal Bank of Canada* (1925), 25 L. J. P. C. 17; cf. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 88, as to revival of vendor's lien.

⁹ Story on Sale, § 219.

certificates, it was held that the giving of the acceptances was not an absolute payment, but conditional on the acceptances being met, and that upon the insolvency of the acceptors the sellers' lien on the goods revived, and the fact that the sellers had negotiated the bills made no difference. "No doubt", says Mellish, L.J., "if the buyer does not become insolvent then credit is given by taking the bill, and during the time that the bill is current there is no vendor's lien, and the vendor is bound to deliver. But if the bill is dishonoured before delivery has been made, then the vendor's lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser."¹⁰ The bills had been discounted, but the seller was liable on them, with recourse over against only the insolvent buyer; otherwise the fact that the bills were in the hands of third parties would have been material.¹¹ Where the seller of goods took the buyer's acceptance and then indorsed the bill to a third person and the bill was dishonoured, it was held that he could not sue the buyer for the price while the bill was outstanding in the hands of a third person, even though he got it back before the action came on for hearing.¹²

Where a cheque has been given in part payment of a debt, the Statute of Limitations as to suing for the balance begins to run from the time when the cheque was given, and not from the time when it was paid.¹³ And where a bill broker pledged negotiable securities with a bank, and the bank released the securities to him on receiving his cheque, it was held that the securities were not impressed with any trust in favour of the bank if the cheque was dishonoured.¹⁴ The fact that a solicitor has taken a bill for his costs does not prevent the bill of costs from being taxed.¹⁵

When the bill or note has been dishonoured it seems that the debt which had been conditionally paid may be treated as sub-

¹⁰ *Gunn v. Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. App. 491, at p. 501; *Re Rankin*, [1927] N. I. 162; and see Sale of Goods Act, 1893, s. 88.

¹¹ *National Savings Bank v. Tranah* (1867), L. R. 2 C. P. 556. A vendor's lien on real estate does not seem to be waived by taking a bill or note: *Ex p. Loaring* (1814), 2 Rose 79.

¹² *Davis v. Reilly*, [1898] 1 Q. B. 1; followed *Re A Debtor*, [1908] 1 K. B. 844, 850, C. A. (bankruptcy notice).

¹³ *Morreco v. Richardson*, [1908] 2 K. B. 592, C. A.

¹⁴ *Lloyds Bank v. Swiss Bankers* (1912), 18 Com. Cas. 79, C. A.

¹⁵ *Re Romer*, [1898] 2 Q. B. 286, at p. 300, C. A.

sisting throughout. Thus, where a debtor gave his creditor a cheque, but on the debt being garnisheed, stopped the cheque, it was held that there was a good subsisting debt which could be garnisheed.¹⁶ Conversely, when the bill or note is duly honoured, the payment dates from the date of the receipt of the bill or note.¹⁷

Creditor holding higher security.—There is, however, a qualification of the rule that a bill or note operates as conditional payment in the case where the creditor already possesses a higher remedy. In *Belshaw v. Bush*,¹⁸ where it was held that the acceptance of a third person operated as a conditional payment, Maule, J., says: "The cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment does not arise, where, if it did, the plaintiff would be deprived of a better remedy than an action on a bill, as in *Davis v. Gyde*,¹⁹ in which the debt being for rent, the plaintiff would part with a remedy for distress; and, as in *Worthington v. Wigley*,²⁰ where the demand being on a bond the plaintiff might in certain events have recourse to other funds than he could in an action on a simple contract". Again, as Warrington, J., says, "the mere giving of a cheque is not conditional payment of a secured debt, so as to release the security".²¹

¹⁶ *Cohen v. Hale* (1878), 8 Q. B. D. 371; *Loughman v. Barry* (1868), 6 Ll. R. C. L. 457; cf. *Re London and Birmingham Bank* (1866), 34 L. J. Ch. 418, as to the effect of a renewal bill on a banker's lien, *sed qu.*

¹⁷ *Hadley Felsa v. Hadley*, [1898] 2 Ch. 680; *Marreco v. Richardson*, [1908] 2 K. B. at p. 592, C. A.

¹⁸ *Belshaw v. Bush* (1861), 11 C. B. 191, at p. 206; cited and approved, *Henderson v. Arthur*, [1907] 1 K. B. 10, at p. 13, C. A. (rent).

¹⁹ *Davis v. Gyde* (1885), 2 A. & E. 623. Held on demurrer that a note given and received for rent does not extinguish the claim for rent which is a debt of a higher degree, and that if such note be pleaded in bar to an avowry it must be shown that the note was accepted in satisfaction, or, that by special circumstances or other circumstances pleaded, it suspended the right of distress. But an agreement to take the note as conditional payment will be inferred from very slight evidence: *Palmer v. Bramley*, [1895] 2 Q. B. 405, C. A.

²⁰ *Worthington v. Wigley* (1886), 8 Scott 558. Held, that a plea of part payment, or the delivery of bills in satisfaction of a bond, after the day on which the money was by the condition made payable is bad on general demurrer. Cf. *Drake v. Mitchell* (1808), 9 East 251; 102 E. R., as commented on in *Re Davison* (1884), 13 Q. B. D. 60, at p. 84, and *Wegg Prosser v. Evans*, [1895] 1 Q. B. 108, C. A., where it was held that an unsatisfied judgment against a joint contractor on a cheque was no bar to an action on the original consideration against the other joint contractor.

²¹ *Re Defries*, [1909] 2 Ch. at p. 428 (specialty debt).

It has also been held that a promissory note, payable by instalments, given contemporaneously to the holder of a bill of sale to secure the same debt, and with a proviso that on default of payment of any instalment the whole is to become due, constitutes a defeasance of the bill of sale within s. 10 of the Bills of Sale Act, 1878.²² And in *Ex p. Matthew* it was held that when a judgment creditor had issued a bankruptcy notice, but afterwards took the debtor's promissory note, he could not, during the currency of the note, obtain a receiving order; for the note, till dishonoured, must be treated as payment.²³

Effect of laches.—If a creditor takes a bill or note as conditional payment, and he is guilty of laches in respect of it, the bill or note is then treated as absolute payment, and as between debtor and creditor the debt is discharged.

Thus, if a bill be indorsed on account of a debt and dishonoured, and the holder omits to give notice of dishonour to the indorser, he cannot sue him for the debt any more than on the bill²⁴; and where a creditor took the cheque of his debtor's agent, and was an unreasonable time in presenting it, whereby his debtor's position was altered, it was held, that, as against the debtor, the cheque must be treated as absolute payment.²⁵

At common law if the creditor lost a negotiable bill which he had taken as conditional payment, he was deprived of his remedies, both on the bill and on the consideration, for "if the bill be lost the condition on which payment may be defeated does not arise".²⁶ But this rigour is now abated by ss. 69 and 70 of the Bills of Exchange Act, p. 229, which authorises application for a new bill or an action on the lost bill.

The question of liability on the consideration, where the party liable is discharged by the holder's laches from liability on the bill, was much discussed at The Hague Conferences, because under the continental systems the holder's duties are absolute duties, and not, as in England, duties to use reasonable diligence.

²² *Counsell v. Lond & West, Discount Co.* (1887), 19 Q. B. D. 512, C. A.

²³ *Ex p. Matthew* (1884), 12 Q. B. D. 506, C. A.; cf. *Re a Debtor*, [1908] 1 K. B. 844, C. A.

²⁴ *Bridges v. Berry* (1810), 3 Taunt. 170; 128 E. R.; cf. *Smith v. Mercer* (1887) L. R. 3 Ex. 51, as to an "approved bill" given without indorsement.

²⁵ *Hopkins v. Ware* (1869), L. R. 4 Ex. 268; as to payments by country bank notes, see *Lichfield Union v. Greene* (1857), 26 L. J. Ex. 141.

²⁶ *Crowe v. Clay* (1854), 9 Exch. 804, at p. 808; 156 E. R., Ex. Ch. (action for price of goods sold and on bill).

The universal foreign opinion appeared to be that the party liable on the consideration was discharged only if and in so far as he proved actual damage resulting from the holder's laches. The English cases seem to assume that the party liable on the consideration is discharged irrespective of damage: see authorities cited p. 182. But it is to be noted that (a) the question has not been argued before a Court of Appeal; (b) in all the cases there was some evidence of damage; and (c) there has been no decision on an unaccepted bill. Suppose D sells a motor-car to A for £500. A pays for it by a bill drawn on B in favour of D. B refuses to accept, and by some mistake D, the seller, gives notice to A, the buyer, two days late. Can A keep the motor-car without paying for it? D has only a piece of paper on which no one is liable. As to cheques, see s. 74.

Absolute payment.—Though the general effect of giving and taking a bill or note is that the debt is conditionally paid, there is nothing to prevent its being given and taken as absolute payment if the parties so intend,²⁷ and the creditor may receive the bill or note in absolute discharge of the debt, trusting solely to his remedies on the instrument. The intention of the parties is a question of fact²⁸; thus, the creditor may be offered cash, but may prefer to take a bill instead.²⁹ Where the debtor is not a party to the instrument, perhaps the inference of absolute payment more readily arises.³⁰

Payment by negotiable security for lesser sum.—Where there is a disputed liability, it may be compromised by the payment of a lesser sum than that claimed, but the general rule of law is that where a liquidated sum is due, it cannot be discharged by the payment of a lesser amount, for there is no consideration for the creditor's promise to forgo the balance.³¹ But by a strictly logical though curious refinement on this rule, it has been held that a liquidated debt may be discharged by the acceptance in satisfaction of a negotiable security for a lesser

²⁷ Benjamin on Sales, 6th ed., p. 900; *Cowasjee v. Thompson* (1845), 5 Moore P. C. 165; 18 E. R.; cf. *Sard v. Rhodes* (1886), 1 M. & W. 153; 180 E. R.; *Sibree v. Tripp* (1840), 15 M. & W. 28; 158 E. R.

²⁸ *Goldshede v. Cottrell* (1886), 2 M. & W. 20.

²⁹ *Anderson v. Hillies* (1852), 12 C. B. 499; 138 E. R., and cases there cited.

³⁰ Cf. *Camidge v. Allenby* (1837), 6 B. & C. 378, at p. 384; 108 E. R. (country bank notes); *Smith v. Mercer* (1867), L. R. 3 Ex. 51 (approved bills), where absolute payment was suggested as an alternative.

³¹ *Peakes v. Bear* (1884), 9 App. Cas. 605, H. L. See notes to *Cumber v. Wane*, 1 Smith L. C., 18th ed., p. 578.

sum, even if the debtor himself be the only person liable on the instrument.³²

Cheque sent in settlement received on account.—There must, however, be an acceptance in satisfaction. If a cheque for a smaller sum be sent in settlement of a larger sum, the creditor can refuse to receive the cheque in satisfaction, even though he does not return it; he may cash it and sue for the balance. In a case where the debtor sent his own cheque in settlement of a claim for damages for breach of contract, and the creditor retained the cheque, sending back a receipt on account, Bowen, L.J., says: "If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim, and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent".³³ But transactions with a third party stand on a different footing. Thus where a father sent a cheque for a smaller sum to settle a debt incurred by his son, it was held that the creditor ought to have returned the cheque if he was not going to take it in satisfaction of the debt.³⁴

Bill or note as evidence of debt.—When an action is brought by the holder of a dishonoured bill, note, or cheque against an immediate party liable thereon,³⁵ he may sue on the consideration as well as on the instrument, and use the instrument as evidence.

Thus in an action on the money counts, where the plaintiff was both drawer and payee of the bill, and the acceptor was the defendant, it was held that the bill was evidence that the defendant was indebted to the plaintiff in the amount of the bill.³⁶ *Aliter*, if drawer and payee were different persons, for then the *prima facie* presumption would be that the acceptor owed the money to the drawer and not to the payee.³⁷ Where

³² *Sibree v. Tripp* (1846), 15 M. & W. 28; 153 E. R. (promissory note of the debtor); *Curlewis v. Clarke* (1849), 8 Exch. 375 (acceptance of third person); *Goddard v. O'Brien* (1882), 9 Q. B. D. 87 (debtor's own cheque); *Bidder v. Bridges* (1887), 87 Ch. D. 406, C. A. (cheque of debtor's solicitor).

³³ *Day v. McLea* (1889), 22 Q. B. D. 610, C. A., at p. 613.

³⁴ *Hirachand v. Temple*, [1911] 2 K. B. 580, C. A., doubting *Goddard v. O'Brien*, *supra*.

³⁵ As to immediate and remote parties, see p. 97.

³⁶ *Thompson v. Morgan* (1811), 3 Camp. 101; 170 E. R.; cf. *Rhodes v. Gent* (1821), 5 B. & Ald. 244, at p. 245, as to account stated.

³⁷ *Early v. Bowman* (1831), 1 B. & Ad. 889; 109 E. R.

This statement appears to require qualification in two respects, firstly, an instrument, not otherwise negotiable, may be made negotiable by statute; secondly, foreign Government bonds to bearer may undoubtedly be negotiable, yet the holder cannot sue the foreign Government upon them in the Courts of this country⁴; the explanation may be that the exemption of a foreign Government from suit in this country is a personal exemption, not arising out of any defect of title on the part of the holder.

The quality of negotiability attaching to instruments which are "accustomably transferable" is an incident annexed by the usage of the English money market, and is not conferred or determined by the law of the place of issue.⁵

Bank notes.—The issue of bank notes is subject to certain statutory restrictions for the protection of the limited monopoly given to the Bank of England, pp. 66, 289, and for stamp purposes they are also subject to special regulations, p. 346. But as regards negotiability, bank notes are on the same footing as other promissory notes payable to bearer on demand. This has been unquestioned law since the leading case of *Miller v. Race*,⁶ decided in 1791, where Lord Mansfield says that bank notes "are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. . . . It has been quaintly said that the reason why money cannot be followed is because it has no earmark, but this is not true. The true reason is upon the account of the currency of it, it cannot be recovered after it has passed in currency".⁷ Thus, where a money-changer in Paris, twelve months after he had received notice of a robbery of bank notes at Liverpool, changed one of the stolen notes in Paris for a stranger, whom he merely required to produce his passport and write his name on the note, it was held that he got a good title, and the fact that he forgot to consult the notice was not evidence

⁴ Cf. *Twycross v. Dreyfus* (1877), 5 Ch. D. 805, quoted p. 322.

⁵ *Picker v. London and County Bank* (1887), 18 Q. B. D. 515, C. A. (Prussian bonds); cf. *Colonial Bank v. Gady* (1890), 15 App. Cas. 267; and in Court below, 88 Ch. D. at p. 404.

⁶ (1791) 1 Burr. 452; 97 E. R.; 1 Smith's L. C., 9th ed., p. 491, and notes.

⁷ But note *Banque Belge v. Hambrouck*, [1921] 1 K. B. 321, 326, C. A., as to the different meanings of the term "currency", and following misappropriated money into a banking account,

of fraud or notice, which alone could affect his title.⁸ As to Bank of England and Bank of Ireland, see s. 97 (8) (c).

Bank post bills.—Bank post bills are used mainly for transmitting money from one branch of a bank to another. They are negotiable instruments, and are usually drawn at seven days or other short date after sight.⁹

Foreign bonds to bearer.—In *Glyn v. Baker*, in 1811, East India bonds belonging to the defendant were misappropriated by his bankers, who replaced them with bonds belonging to the plaintiff. The bonds were not in terms negotiable, though they were indorsed in blank by the payee. It was held that they were not negotiable, and that the defendant could not retain the substituted bonds as against the plaintiff.¹⁰ But, as was pointed out in *Goodwin v. Roberts*, “the inconvenience which would have arisen from this decision was remedied by the immediate passing of the East India Company Bonds Act, 1811 (51 Geo. 3, c. 64), by which bonds of the East India Company were made transferable by delivery.”¹¹

In *Gorgier v. Mieville*, in 1824, Prussian Government bonds, payable to bearer, were wrongfully pledged by the plaintiff's agent. On proof that these bonds were treated as negotiable in the London money market, it was held that the plaintiff could not recover them from the pledgee, who had acted in good faith.¹² This case has been frequently approved and followed.

In *Lang v. Smyth*, in 1881, Neapolitan obligations to bearer called “*Bordereaux*” were issued with coupons attached. The plaintiff's agent wrongfully pledged the bonds without the coupons, and the jury found that the bonds were not negotiable without the coupons. It was held that the plaintiff could recover the bonds.¹³

In *Att.-Gen. v. Bouwens*, in 1888, the question was, whether probate duty was payable on certain Russian and Danish bonds

⁸ *Raphael v. Bank of England* (1855), 17 C. B. 161; 189 E. R.

⁹ *Forbes v. Marshall* (1855), 24 L. J. Ex. 805 (where form is given); cf. *Wills v. Bank of England* (1885), 4 A. & E. 21; 111 E. R.; *Hart on Banking*, p. 584. As to bank post bills issued by Bank of England and in Scotland, see 5 Geo. 3, c. 49.

¹⁰ *Glyn v. Baker* (1811), 18 East 509; 104 E. R.

¹¹ *Goodwin v. Roberts* (1875), L. R. 10 Ex. 887, at p. 854.

¹² *Gorgier v. Mieville* (1824), 3 B. & C. 46; 107 E. R.

¹³ *Lang v. Smyth* (1881), 7 Bing 284; 181 E. R., as explained *Goodwin v. Roberts* (1875), L. R. 10 Ex. 887, at p. 856.

to bearer. On proof that the bonds were treated as negotiable in the English market, it was held that they were negotiable instruments constituting assets in England. "All these instruments", says Lord Abinger, "have been clearly framed with a view to their becoming subjects of sale, and easily transmissible from hand to hand."¹⁴

In *Picker v. London and County Bank*, in 1887, Prussian bonds were stolen from the plaintiff and pledged with the defendants. The bonds were issued with detached coupons. It was proved that the bonds were treated in Prussia as payable to bearer and negotiable by delivery apart from the coupons. But there was no evidence that they were so treated in the English money market. Held, that they were not negotiable, and that the plaintiff could recover them. "If", says Lord Esher, "all that can be proved is that by the law or custom in Prussia the instrument is negotiable, then the answer is that an English Court and English merchants are not bound by a law or custom of trade in Prussia. To prove that an instrument is negotiable in the sense required there must be something to make it so by English law."¹⁵

In *London and County Bank v. River Plate Bank*, in 1888, negotiable foreign bonds were stolen from the defendants by their manager and pledged with the plaintiffs. Subsequently the manager by fraud obtained the bonds, or bonds of a like character, back from the plaintiffs, and restored them to the defendants. Held, that the defendants were entitled to retain the bonds so restored.¹⁶

In *Sheffield v. London Joint Stock Bank*, in 1888, M, a money-dealer, made an advance on certain negotiable bonds and other securities belonging to S. The money-dealer deposited them and other securities with the bank to secure a large running account, and then became bankrupt. The bank claimed to retain the securities belonging to S against the general balance due from the money-dealer. It was held that the bank could not do so,

¹⁴ *Att.-Gen. v. Bouwens* (1888), 4 M. & W. 171, at p. 190; 150 E. R.; cf. *Hesseltins v. Siggers* (1848), 1 Exch. 856, where Spanish stock was held to be negotiable, and therefore not within s. 17 of the Statute of Frauds.

¹⁵ *Picker v. London and County Bank* (1887), 18 Q. B. D. 515, at p. 518, C. A.; approved, *Williams v. Colonial Bank* (1888), 38 Ch. D. at p. 404, C. A.; and *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280, at p. 297, per Hamilton, J.

¹⁶ *London and County Bank v. River Plate Bank* (1888), 21 Q. B. D. 555, C. A.; affirming S. C., 20 Q. B. D. 282.

whether the securities were negotiable or not, for they had notice that the securities were not the money-dealer's property. S, therefore, was entitled to redeem his securities on paying the bank the amount he owed the money-dealer. "He was a money-dealer", says Lord Macnaghten, "he lent money to customers on securities which they deposited with him. He pledged those securities to the banks who supplied him with the money. The banks knew that in most cases, if not in all, the securities which he deposited with them were not his own absolute property. That information was conveyed by the nature and extent of his business."¹⁷

In *London Joint Stock Bank v. Simmons*, in 1892, plaintiff deposited with his stockbroker, for safe custody, certain Cedula bonds which were payable to bearer. The broker wrongfully sold the plaintiff's bonds, but purchased others of the same kind, and entered them in his books in the plaintiff's name, thus replacing what he had taken. Afterwards he pledged the new bonds *en bloc* with securities belonging to other customers with the defendant bank to secure an advance to himself. Held, that the bank was entitled to retain the bonds against the advance, it being a pledgee for value and in good faith of negotiable instruments.¹⁸

In *Venables v. Baring Brothers*, in 1892, American railway bearer bonds were stolen from the defendants. The loss of the bonds was duly advertised. The plaintiffs were French bankers who, in good faith, had made advances to a customer on the bonds. Held, that the plaintiffs had a good title to the bonds and the interest due on them, as, at the time when they took them, they had no notice of the theft.¹⁹

In *Edelstein v. Schuler & Co.*, in 1902, American railway bonds payable to the bearer, or, in case of registration, to the registered holder, were stolen by the plaintiff's clerk, and sold by him on the

¹⁷ *Sheffield v. London Joint Stock Bank* (1888), 18 App. Cas. 383; reversing the decision of Court below reported as *Easton v. London Joint Stock Bank* (1886), 34 Ch. D. 95, C. A. Having regard to the next case, this decision must be regarded as a finding on the particular facts, and not as laying down any general principle.

¹⁸ *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, reversing the Court of Appeal, [1891] 1 Ch. 271. Cf. *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120 (negotiable securities lodged with stockbroker, who pledges them with his bankers); *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280, affirmed 18 Com. Cas. 79, C. A. (negotiable securities wrongly pledged, return of equivalent but not identical securities).

¹⁹ *Venables v. Baring Brothers*, [1892] 3 Ch. 527.

Stock Exchange. It was held that these were negotiable instruments, and that the price of the bonds could not be recovered from the stockbroker, who took them in good faith, and disposed of them on the Stock Exchange.²⁰

As to United States municipal and corporation bonds, see *Daniel* on Negotiable Instruments, Chap. XLVIII.

Non-liability of foreign Government and its agents.—In *Twycross v. Dreyfus*, in 1877, bonds were issued by the Peruvian Government through Dreyfus Brothers, its English agents, and the surplus imports of guano were stated to be hypothecated for the payment of the bonds. It was held that no action could be maintained in respect of the bonds or the guano received by Dreyfus Brothers. "The municipal law of this country", says Jessel, M.R., "does not enable the tribunals of this country to exercise any jurisdiction over foreign Governments as such. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour"²¹; and James, L.J., adds: "You cannot sue the Peruvian Government, and it would be a monstrous assumption of jurisdiction to endeavour to sue a foreign Government indirectly, by making its agents in this country defendants, and then saying you have got the money of the Government, and you ought to apply that".²²

Circular notes.—Circular notes are negotiable instruments. In a case in 1867, where the law and practice respecting them was fully discussed, the plaintiff's agent remitted to him the letter of indication and notes by post. The notes were lost, and it was held that the issuing banker could debit his account with the amount of the notes, unless he offered a proper indemnity. The Court there say: "Upon the true construction of the letter of indication and circular notes, it is not obligatory upon the holder to cash the circular notes, though he purchases the right to do so. In the event of his not requiring to use them abroad, he may, after reasonable notice of his electing not to use them, require repayment at the banker's hands. . . . The correspondent

²⁰ *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144.

²¹ *Twycross v. Dreyfus* (1877), 5 Ch. D. 805, C. A., see at p. 616; and cf. *National Bolivian Navigation Co. v. Wilson* (1880), 5 App. Cas. 176.

²² *Twycross v. Dreyfus*, *supra*, at p. 618. See, further, as to the non-liability of the English agent issuing the bonds, *Goodwin v. Roberts* (1875), L. R. 10 Ex. 837, at p. 844. Cf. the *Kelantan Case*, [1928] A. C. 325, H. L., as to a submission to arbitration.

who cashes a circular note ought to, and commonly does, for his own protection, look at the letter of indication, for the purpose of identifying the holder of the circular note; but his doing so is not made a condition precedent. If he cashes the circular note for the person mentioned in the letter of indication, he has recourse against the banker, although from civility, overconfidence, or mere omission, he may not have asked for the letter of indication. And, on the other hand, if after the letter of indication has been properly filled in by the rightful owner with his signature, a foreign correspondent cashes a circular note for a thief, who has succeeded in stealing the letter of indication and circular note and in forging the name of the holder, no care in looking at the letter of indication can eke out a right to recover against the banker, as upon a payment to the right person".²³

Debentures.—The term "debenture" is a term of uncertain extension.²⁴ "You may", says Lindley, L.J., "have mortgage debentures which are charges of some kind on property—you may have debentures which are bonds; and if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness."²⁵

Two points seem pretty clear. First, when a money obligation, bearing the name of a debenture, is issued by a company, it may be stamped as a debenture, though by reason of its form it might also fall under some other stamp definition.²⁶ Secondly, if an instrument issued as a debenture, is in substance a promissory note within the definition given by s. 88 of the Act, any objection to its negotiability which could formerly have been urged by reason of its being under seal appears now to be removed by s. 91 (2) of the Act, p. 288.²⁷

Prima facie no doubt a debenture is not a negotiable instrument, and is only assignable in like manner and subject to the

²³ *Confans Quarry Co. v. Parker* (1887), L. R. 3 C. P. 1; see pp. 10 and 12. See, further, Paget on Banking, 4th ed., p. 146.

²⁴ Buckley on the Companies Acts, 11th ed., p. 174.

²⁵ *British India Steam Co. v. Inland Revenue* (1881), 7 Q. B. D. 165, at p. 172, where the question at issue was the stamp; cf. *Edmonds v. Blaina Co.* (1887), 38 Ch. D. at p. 218; *English Investment Co. v. Brunton*, [1892] 2 Q. B. at p. 712, C. A.

²⁶ *British India Steam Co. v. Inland Revenue* (1881), 7 Q. B. D. 165.

²⁷ In *Masoarenhas v. Mercantile Bank of India* (1931), 47 T. L. R. 611, it was agreed by both sides that the debenture in question was a promissory note under the Indian Act, XXVI of 1881.

like conditions as an ordinary chose in action; but the question must be determined by reference to the form of the particular instrument, the usage of the money market, and the facts of the particular case. It is to be noted that though an instrument may not be negotiable in the proper sense of the term, it may have a quasi-negotiability by estoppel, that is to say, particular parties may be precluded from denying it the qualities of negotiability in particular cases.

In *Re Blakely Ordnance Co.*, in 1867, pursuant to an antecedent contract with D, debentures were issued by the company payable to "D or the bearer hereof", and were transferred for value. It was held that, though the holder might not be able to sue in his own name, he might prove in the winding-up in his own name, without reference to any equities between the company and D, the company being estopped by the form of the instrument.²⁸

In *Re Natal Investment Co.*, in 1868, debentures were issued by the company payable to "C, his executors or assigns, or the holder for the time being of this debenture bond", and were transferred for value. It was held that the case was distinguishable from the last one by the different circumstances under which the debentures were issued, and that the holder could only prove in the winding-up subject to any equities between C and the company.²⁹

In *Re General Estates Co.*, in 1868, the company issued debenture bonds payable to C or order, which were indorsed by him for value. It was held that as the company had power to issue negotiable instruments, the indorsee could prove in the winding-up without reference to any equities between the company and C, and *semble*, that the instruments were promissory notes.³⁰

In *Re Imperial Land Co.*, in 1870, a company issued debenture bonds payable to bearer which were afterwards sold in the open market. It was held by Malins, V.-C., that these instruments were on the footing of promissory notes, and that the holders could prove in the winding-up without reference to any equities between the company and the person to whom they were issued.³¹

In *Webb v. Herne Bay Commissioners*, in 1870, assignable

²⁸ *Re Blakely Ordnance Co.* (1867), L. R. 3 Ch. App. 154.

²⁹ *Re Natal Investment Co.* (1868), L. R. 3 Ch. App. 355, see at p. 358.

³⁰ *Re General Estates Co.*, *ex p. City Bank* (1868), L. R. 3 Ch. App. 758, see at p. 762, explaining the last case.

³¹ *Re Imperial Land Co. of Marseilles*, *ex p. Colborne* (1870), L. R. 11 Eq. 478.

debentures (form not given) were issued by the commissioners which purported to have been executed pursuant to statutory powers, and it was held that the commissioners were estopped from alleging that the debentures were issued in contravention of their statutory powers, and that a mandamus could issue to compel them to pay the interest on the debentures.³²

In *Crouch v. Crédit Foncier*, in 1878, the company issued debentures payable to bearer, subject to conditions as to drawings, indorsed on the back. Some of these debentures were stolen, and afterwards purchased by the plaintiff, who acted in good faith. The plaintiff sued the company, who declined to pay, as they had notice of the robbery. It was admitted that similar instruments had been treated as negotiable. It was held that the usage did not make these instruments negotiable, as being contrary to general law, and it was doubted whether an instrument under seal could be a promissory note.³³ This case was doubted in *Goodwin v. Roberts*, in 1875, where the Court say that the case might be supported "on the ground that there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established it would have been sufficient ground for refusing to give effect to it that it did not form part of what is called the ancient law merchant".³⁴

In *Re Romford Canal Co.*, in 1888, the company issued assignable debentures (form not given). Some were transferred for value to C, and others were deposited with D. Held, that C could prove without reference to equities between the company and the person to whom the debentures were issued, but that D took only as an equitable assignee, and could only prove for the amount he had advanced. Kay, J., reviews the previous cases and sums up their effect as follows: "Where a company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite esse acta*. If such security be legally transferable, such an irregularity, and, *a fortiori*, any equity against the original holder, cannot be asserted by the company against a *bona fide* transferee for value without notice; nor can such an equity be set up against an equitable transferee, whether the

³² *Webb v. Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642.

³³ *Crouch v. Crédit Foncier* (1878), L. R. 8 Q. B. 374.

³⁴ *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, at p. 356, Ex. Ch.

security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity".³⁵

In *Bechuanaland Exploration Co. v. London Trading Bank*, in 1898, the plaintiffs held certain bearer debentures issued by an English company. The plaintiffs' secretary stole the debentures, and pledged them with the defendant bank for advances made. The defendants received the debentures in good faith, and it was shown that by the usage of the money market such debentures were treated as negotiable by delivery. It was held that the debentures were negotiable by custom, and that the defendants were entitled to retain them.³⁶

This case was followed in 1902 in *Edelstein v. Schuler & Co.*, where it was further held that the usage to treat these instruments as negotiable had been so often established that it was no longer necessary to prove it in evidence.³⁷

By s. 77 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 28), a doubt is removed as to the validity of debentures to bearer issued in Scotland, and they are declared to be valid and binding according to their terms.

Deposit notes.—A banker's deposit note or receipt is not a negotiable instrument.³⁸

Dividend warrants.—In *Partridge v. Bank of England*, in 1846, dividend warrants payable to J. P., without the addition of the words "order" or "bearer", were held not to be negotiable, although they bore J. P.'s receipt, and it was the practice of bankers to treat them as negotiable.³⁹ This case has since been doubted.⁴⁰ And now by s. 8 of the Act, p. 26, instruments within the Act are negotiable unless they contain words prohibiting transfer. Apart from some peculiarity in the form of the particular instrument,⁴¹ a dividend warrant is practically an

³⁵ *Re Romford Canal Co.* (1888), 24 Ch. D. 85, at p. 92.

³⁶ *Bechuanaland Exploration Co. v. London Trading Bank, Ltd.*, [1898] 2 Q. B. 658.

³⁷ *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144.

³⁸ *Clegg v. Burnett* (1887), 58 L. T. 775; as to deposit note with cheque form on back, see *Re Dillon* (1890), 44 Ch. D. 76; and cf. *Beauchlerk v. Graaves* (1886), 2 T. L. R. 887 (receipt for bonds), and Hart on Banking, 3rd ed., pp. 607 *et seq.* As to assignment of beneficial interest by surrender and taking out a new deposit note in name of assignee, see *McEncany v. Shalein*, [1912] 1 Ir. R. 278, C. A.

³⁹ *Partridge v. Bank of England* (1846), 9 Q. B. 396; 115 E. R., Ex. Ch.

⁴⁰ *Goodwin v. Roberts* (1876), L. R. 10 Ex. 887, at p. 854.

⁴¹ Cf. Paget on Banking, 4th ed., pp. 136, 280; cf. *Thairwall v. Great Northern Ry.*, [1910] 2 K. B. 589 (dividend warrant lost in post and cashed by thief). And cf. *Slingsby v. Westminster Bank* (1930), 47 T. L. R. 1.

ordinary cheque. By s. 97 (8) (d) nothing in the Act is to affect "the validity of any usage relating to dividend warrants or the indorsement thereof". This enactment was probably intended to protect the usage of paying dividend warrants on the indorsement of one of several payees, but otherwise it seems to contemplate them as falling within the Act, where their form satisfies its requirements.

Exchequer bonds.—Exchequer bonds, unless registered, are negotiable instruments payable to bearer, with bearer coupons attached. They are regulated by 29 & 30 Vict. c. 25; 52 & 53 Vict. c. 6; and 5 & 6 Geo. 5, c. 55. For history of these instruments, see *Palgrave's Dictionary of Political Economy*.

Exchequer bills.—Exchequer bills are negotiable instruments. They were invented about the year 1695 by Charles Montagu, the Chancellor of the Exchequer under William III, in order to supply the wants of the nation at the time of the great re-coinage. They were first regulated by the statute 48 Geo. 3, c. 1. That Act is now superseded by the Exchequer Bills and Bonds Act, 1866 (29 & 30 Vict. c. 25), as amended by the Treasury Bills Act, 1877 (40 & 41 Vict. c. 2); the National Debt Act, 1889 (52 & 53 Vict. c. 6), s. 5; and the Finance Act, 1916 (6 & 7 Geo. 5, c. 24), s. 69 and Second Schedule. Exchequer bills are, at the option of the holder, current for a period of five years, but they may be sent in for payment, if the holder wishes it, once in the year at a fixed date, and during the six months preceding that fixed date they may be used for the payment of taxes. The interest on Exchequer bills is fixed half-yearly, and varies with the market rate of interest. Their negotiability was first affirmed in 1820 in a case where an Exchequer bill to "— or order" was improperly pledged by an agent of the owners.⁴² In 1846 the question arose whether the general lien of bankers applied to these instruments. It was held that it did, though the circumstances under which the particular bills had been deposited were such as to exclude the lien. "Exchequer bills", said Lord Campbell in that case, "are negotiable securities passing by delivery. The holder of negotiable securities is to be assumed to be the owner,

⁴² *Wookey v. Pole* (1820), 4 B. & Ald. 1, see at pp. 10 and 13; 106 E. R.; but as to the effect of a blank in other cases, see *France v. Clark* (1884), 26 Ch. D. 257, at p. 262, C. A.

and third parties acting *bona fide* may treat with him as owner. . . . The right acquired by a general lien is an implied pledge, and where it would arise (supposing the securities to be the property of the apparent owner) I think it equally exists if the party claiming it has acted in good faith, although the subject of that lien should turn out to be the property of a stranger.”⁴³

Pay and pension warrants.—Pay and pension warrants issued by the Paymaster-General are not negotiable instruments.⁴⁴ But they may be crossed as if they were cheques: see s. 17 of the Revenue Act, 1883, p. 344.

Post office orders and postal orders.—Post office orders, it seems, are not negotiable instruments. Thus, in *The Fine Art Society v. Union Bank*, in 1886, the plaintiffs' manager and the plaintiffs both banked with the defendants. The manager paid in to his own account post office orders belonging to the plaintiffs, and the defendants cashed them. The Post Office regulations provide that where a post office order is presented by a banker it is sufficient if it bears the stamp of the banker, although it is not signed by the payee. It was held that unsigned post office orders were not negotiable by delivery, and that the bank were liable for the conversion of the orders. The effect of the regulation was only to make “the signature of a banker a substitute for the signature to the receipt of the original payee”.⁴⁵ As to post office orders, see further s. 28 of the Post Office Act, 1908 (8 Edw. 7, c. 48). As to postal orders, see ss. 24 and 25 of that Act, and the regulations made there under. For a few months after outbreak of war in 1914 postal orders were made legal tender under the powers conferred by s. 1 (6) of the Currency and Bank Notes Act, 1914 (4 & 5 Geo. 5, c. 14).

In *Goodwin v. Roberts*, in 1875, scrip to bearer for Russian Government bonds was held to be negotiable, and where the broker in possession of the scrip improperly pledged it with his own bankers, it was held that they got a good title. The Courts of Exchequer and Exchequer Chamber based their decision on the ground of mercantile usage. The House of Lords accepted

⁴³ *Brandao v. Barnett* (1846), 12 Cl. & F. 787, at p. 805; 8 E. R., H. L.

⁴⁴ *Jones & Co. v. Coventry*, [1909] 2 K. B. 1029, at pp. 1040, 1041.

⁴⁵ *Fine Art Society v. Union Bank* (1886), 17 Q. B. D. 708, C. A., see at p. 713; and cf. *McEntire v. Potter & Co.* (1889), 22 Q. B. D. at p. 442; and *Paget on Banking*, 4th ed., p. 144.

this ground, but further affirmed the Courts below on the ground that the form of the instrument created an estoppel.⁴⁶ In 1877, on similar facts, scrip certificates to bearer for shares in an English joint stock company (the Anglo-Egyptian Banking Company, Ltd.), were held to be negotiable.⁴⁷

The non-liability of the English agents who signed the foreign scrip was clearly pointed out.⁴⁸

Share certificates and transfers.—Share certificates and transfers are not negotiable instruments. In *Swan v. North British Australasian Co.*, in 1868 (where the distinction between share transfers and negotiable instruments is clearly pointed out by Byles, J.), the plaintiff wishing to sell some shares in a company, executed a transfer form in blank. His broker fraudulently filled up the transfer with the description of shares in another company and sold them to a *bona fide* purchaser. Held, that the sale was ineffectual, and that the plaintiff was entitled to have his name restored to the list of shareholders.⁴⁹

In *France v. Clark*, in 1884, the holder of shares in a company deposited the certificates with C as security for £150, and executed a transfer with the transferee's name in blank. C deposited the certificates and transfer as security for £250 with D. After C's death, D filled in his own name as transferee. Held, that D had no title to the shares beyond a claim for the £150 advanced by C, and that the same principle would have applied even if the shares had been negotiable instruments.⁵⁰

In *London and County Bank v. River Plate Bank*, in 1887, share certificates of the Pennsylvania Railway with blank transfer forms indorsed on the back, were stolen by a bank manager and pledged with the plaintiffs for his private account. He afterwards obtained them back from the plaintiffs by fraud and restored them to his own bank. It was shown that these shares were treated as negotiable by delivery in the English market. Held,

⁴⁶ *Goodwin v. Roberts* (1875), L. R. 10 Ex. 76, and in Ex. Ch. 897; affirmed by H. L. 1 App. Cas. 476. See the last ground criticised, *Colonial Bank v. Cadiz* (1890), 15 App. Cas. 267, at p. 282.

⁴⁷ *Rumball v. Metropolitan Bank* (1877), 1 Q. B. D. 194.

⁴⁸ *Goodwin v. Roberts* (1875), L. R. 10 Ex. 897, at p. 944. See, too, cases cited, p. 819, as to foreign bonds.

⁴⁹ *Swan v. North British Australasian Co.* (1868), 32 L. J. Ex. 273, at p. 278, Ex. Ch.; cf. *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20. As to the liability of the company certifying the transfer to the transferee, see *Rishop v. Balkis Co.* (1890), 25 Q. B. D. 512, C. A.

⁵⁰ *France v. Clark* (1884), 26 Ch. D. 257, C. A.

that they were not negotiable instruments, and that the pledgees (plaintiffs) had no title to them."⁵¹

In *Sheffield v. London Joint Stock Bank*, in 1888 (p. 820) share certificates, and other securities, some of which were clearly negotiable, were pledged with a money-dealer and afterwards deposited by him with his bankers to secure a running account. The case turned on the point that the bankers knew that the securities were not the money-dealer's own and is therefore not in point here.

In *Williams v. Colonial Bank*, in 1888, the executors of a shareholder in a New York railway executed blank transfers which were indorsed on the back of the share certificates, and handed them to a broker for sale. The broker fraudulently pledged them with the bank for advances to himself. Held, that the executors were entitled to have the certificates back from the bank. "It is admitted", said Bowen, L.J., "that the certificates are not negotiable instruments according to English law. . . . The broad principle is that, except in the case of a sale in market overt, a person does not acquire a title to a personal chattel from anybody except the true owner"; and, dealing with the question of estoppel, he points out that it must consist in some express or implied representation, and that in this case there was nothing on the face of the documents to suggest that the "bearer" would become entitled to the shares.⁵² The decision was affirmed in 1890 by the House of Lords under the name of *Colonial Bank v. Cady*, when it was held that as the dealings with the certificates took place in England, the rights in respect of such dealings must be determined by English law, and that the conduct of the executors in delivering the certificates to their broker, with the transferee's name in blank, did not preclude them from setting up their title against the bank. After distinguishing the case of negotiable instruments, Lord Herschell says: "The question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by reference to the law of the State of New York. But the rights arising out of a transaction entered

⁵¹ *London and County Bank v. London and River Plate Bank* (1887), 20 Q. B. D. 292. The case was appealed on another point as to negotiable bonds, and affirmed, 21 Q. B. D. 535, C. A.; cf. *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. at p. 297, per Hamilton, J.

⁵² *Williams v. Colonial Bank* (1888), 38 Ch. D. 388, at p. 408, C. A.

into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here".⁵³ In *Fry v. Smellie*,⁵⁴ in 1912, the holder of shares in a company handed to an agent the share certificates and a transfer signed in blank, instructing him to borrow thereon a specified sum of money. The agent, contrary to his instructions, borrowed a less sum of money. Held, that the lender could retain the documents until repayment of the sum he had lent.

In *Fuller v. Glyn, Mills & Co.*, in 1914,⁵⁵ the plaintiff bought shares which he left with his stockbrokers, and which with his knowledge were put into the names of two nominees of his brokers. The brokers pledged these shares with their bankers. Held, that the bankers had a good title as pledgees, there being nothing to put them on inquiry as to the brokers' rights to deal with them.

Treasury bills.—Treasury bills owe their origin to the Treasury Bills Act, 1877 (40 & 41 Vict. c. 2), and they are regulated by that Act as amended by s. 5 of the National Debt Act, 1889 (52 & 53 Vict. c. 6), and the Revenue Act, 1906 (6 Edw. 7, c. 20), s. 10, and by regulations made by the Treasury. The regulations now in force are those of May 31, 1889 (see Stat. Rules and Orders, Revised, vol. 10). Treasury bills constitute part of the unfunded or floating debt of the country, and are dealt with as ordinary commercial bills. The Treasury advertise for tenders, and the bills are issued at the best price that can be obtained for them. See also Exchequer Bills, p. 327.

Treasury currency notes.—The issue of Treasury currency notes for £1 and 10s. was authorised and regulated by the Currency and Bank Notes Act, 1914 (4 & 5 Geo. 5, c. 14), as amended by the Currency and Bank Notes (Amendment) Act, 1914 (4 & 5 Geo. 5, c. 72), the Finance Act, 1915 (5 & 6 Geo. 5, c. 62), s. 27, and s. 1 of the Gold Standard Act, 1925 (15 & 16 Geo. 5, c. 29).⁵⁶ They were bearer notes issued by the Treasury, and were legal

⁵³ *Colonial Bank v. Cadby* (1890), 15 App. Cas. 287, at p. 288.

⁵⁴ [1912] 3 K. B. 282, O. A.

⁵⁵ [1914] 2 K. B. 168.

⁵⁶ The operation of s. 1 (2) of this Act is suspended by the Gold Standard (Amendment) Act, 1931 (21 & 22 Geo. 5, c. 46).

tender throughout the United Kingdom. The legislation authorising their issue was repealed in 1928.⁵⁷

Warranty of title and genuineness.—In the case of a bill or note payable to bearer the obligations of the transferor as regards its genuineness and his right to transfer are defined by s. 58 (8) of the Bills of Exchange Act. In the case of other negotiable securities, the precise extent of the transferor's liabilities is not very clear. It seems that, as in the case of a sale of goods, the seller warrants his right to sell,⁵⁸ but it is doubtful whether the buyer is only entitled to a return of his money if the seller have no title, or whether he can sue for damages beyond.

Where the buyer had bought forged scrip which the seller had sold in good faith, it was held that he was only entitled to a return of the money he had paid.⁵⁹ Where shares are sold and the buyer refuses to accept and pay for them, the measure of damages is the best obtainable market price at the date of breach.⁶⁰

⁵⁷ By the Currency and Bank Notes Act, 1928, s. 13, and Schedule.

⁵⁸ *Raphael v. Burt* (1884), 1 C. & E. 825 (United States "called bonds"); cf. *Meyer v. Richard* (1895), 163 United States Rep. 885, at p. 405.

⁵⁹ *Westropp v. Solomon* (1849), 8 C. B. 845, see at p. 378; 138 E. R.; cf. *Young v. Cole* (1837), 3 Bing. N. C. 724; 132 E. R. (Guatemala bonds); *Lamert v. Heath* (1816), 15 M. & W. 486; 163 E. R. (railway scrip); *Gompertz v. Bartlett* (1853), 2 E. & B. 819; 118 E. R. (foreign bill); *Gurney v. Womersley* (1854), 4 E. & B. 183, at p. 141; 119 E. R. (with forged acceptance).

⁶⁰ *Jamal v. Moolla Dawood*, [1916] A. C. 175, P. C.

APPENDIX I



FORMS

No. 1.—INLAND BILL OF EXCHANGE.

£100

London, 1st January, 1887.

Three months after date pay to our order the sum of one hundred pounds for value received.

ANDREWS & Co.

To Messrs. Brown & Sons, Liverpool.

No. 2.—FOREIGN BILL OF EXCHANGE.

No. 025. Exchange for £100.

Calcutta, 1st January, 1882.

Six months after sight of this first of Exchange (second and third unpaid), pay to the order of Mr. John Charles one hundred pounds, for value received, and charge the same to account of Messrs. Smith & Co. against your letter of credit, No. 21.

JAMES ANDREWS.

To Mr. J. Brown, London.

No. 8.—FOREIGN BILL OF EXCHANGE.

No. 015.

London, 1st February, 1882. For Rs.550—8—0.

At sixty days after sight of this first of Exchange (second and third unpaid), pay to the order of Messrs. Charles & Co. five hundred and fifty rupees, eight annas, which place to account shipment of copper per "Swallow".

Value received.

ANDREWS & Co.

To Messrs. Brown & Sons, Calcutta.

No. 4.—PROMISSORY NOTE.

£100

London, 1st January, 1882.

On demand I promise to pay to Mr. John Charles or order one hundred pounds, with interest at five per cent. per annum until payment, for value received.

JOHN BROWN.

No. 5.—FRENCH BILL.¹Paris, le 1^{er} Mai, 1887.

B. P. 1,000 fr.

A deux mois de vue il vous plaira payer par cette seule de change à l'ordre de M. Charles la somme de mille francs, valeur en marchandises (ou en compte, ou en argent, &c.), sans autre avis de

Votre serviteur,

A Messieurs V. Bonner & Cie.
Au Havre.

DUFOUR.

No. 6.—TREASURY BILL.

(Per Acts 40 Vict. c. 2, and 52 Vict. c. 6.)

Due

A. 0000.1.

A. 0000.1.

£

London.

This Treasury bill entitles² or order to payment of pounds at the Bank of England out of the Consolidated Fund of the United Kingdom on the

Secretary to His Majesty's Treasury.

No 7.³—NOTICE OF DISHONOUR [OR PROTEST] TO DRAWER.

[Date and address.]

Take notice that a bill, for £ drawn by you under date the
on and payable at , has been dishonoured by non-

¹ See Bravard-Demangeat, 7th ed., p. 276.² If this blank be not filled in the bill will be paid to bearer.³ This and the two following forms are those given in the Schedule to the Bills of Exchange Bill, 1881. They were omitted in the Act.

payment* [or non-acceptance], and that you are held responsible therefor.

(Signed) J. S.

N B.—In the case of a foreign bill add "*and protested*", if it has been noted or protested.

NO. 8.—NOTICE OF DISHONOUR [OR PROTEST] TO INDORSER.

[Date and address.]

Take notice that a bill, for £ drawn by under date the on and payable at , and which bears your indorsement, has been dishonoured by non-acceptance [or non-payment],* and that you are held responsible therefor.

(Signed) J. S.

* N B.—In the case of a foreign bill add "*and protested*", if it has been noted or protested

NO. 9.—NOTICE TO DRAWER OF PARTIAL ACCEPTANCE.

[Date and address.]

Take notice that a bill, for £ drawn by you under date the on , has been accepted by him for £ only, and that you are held responsible for the balance and expenses.

(Signed) J. S.

NO. 10.—ENGLISH PROTEST FOR NON-ACCEPTANCE.

On the day of one thousand eight hundred and eighty , I [James Brown], public notary, by lawful authority and sworn, dwelling in in the county of in the United Kingdom of Great Britain and Ireland, at the request of C D [or of the holder] did exhibit the original bill of exchange, whereof a true copy is on the other side written, unto E F at his counting-house [or unto a clerk in the counting-house of E F], the person upon whom the same is drawn, and demanded acceptance thereof, and he answered [that it would not be accepted at present or as the case may be].

Wherefore I, the said notary, at the request aforesaid, did and do by these presents protest against the drawer of the said bill and all other parties thereto, and all others concerned, for all costs of exchange, re-exchange, and all costs, damages, and interest, present

and to come, for want of acceptance of the said bill. Thus protested in the presence of W S and T R, witnesses.



Which I attest,

JAMES BROWN,

Notary public of —.⁴

No. 11.—ACT OF HONOUR.

On the day of , one thousand eight hundred and eighty , I [James Brown], notary public, duly admitted and sworn, dwelling in [Liverpool] in the county of , in the United Kingdom of Great Britain and Ireland, do hereby certify that the original bill of exchange for pounds, of which a copy is on the other side written (and protested for non-payment) was this day exhibited unto C D of [Liverpool], one of the firm of [Smith & Co], who declared before me that the said firm would pay the amount of the said bill for the honour of [James & Co.], the indorsers, holding the drawers and all prior indorsers, and all other proper persons, responsible to them the said [Smith & Co.] for the said sum, and for all interest, damages, and expenses. I have therefore granted this notarial act of honour accordingly.



Which I attest,

JAMES BROWN,

Notary public of Liverpool.

No. 12.—FRENCH PROTEST FOR NON-ACCEPTANCE.

L'an le à la requête du sieur négociant patenté, demeurant à disant domicile en ma demeure.

J'ai soussigné, sommé et interpellé le sieur N au domicile indiqué au titre ci-dessus transcrit à rue où étant j'ai parlé à de présentement accepter, pour payer à l'échéance, la lettre de change ci-dessus trans-crite, de la somme de lui déclarant qu'à défaut je protestais toutes pertes, dépens, dommages et intérêts du renvoi de la-dite lettre de change, à qui de droit, change, rechange et autres frais, aux risques, périls et fortune de qui il appartiendra. Lequel a répondu que (réponse) et a signé (signature)

⁴ See Brooks' Notary, 5th ed., pp 214, 222; and Chitty's Commercial Law, Vol. 4, p 344.

[ou sommé de signer sa réponse, a refusé]. Laquelle réponse j'ai pris pour refus d'acceptation et j'ai réitéré les protestations ci-dessus faites sous toutes réserves.

Le tout fait en présence et assisté de J B, demeurant à L— et de T S, demeurant à M— témoins français, majeurs, lesquels ont avec moi signé le présent, dont acte, duquel j'ai, au dit domicile, et parlant comme dessus, laissé au susnommé copie, ainsi que de la dite lettre de change. Le coût est de . . .

[*Signatures.*]

^s Brévard-Demangeat, 7th ed, p 248 The witnesses, though usual, are not necessary.

APPENDIX II

STATUTES

PROMISSORY NOTES ACT, 1868.

(26 & 27 VICT. c. 105.)

An Act to remove certain restrictions on the negotiation of Promissory Notes and Bills of Exchange under a limited sum.

[28th July, 1868.]

Repeal of certain enactments restraining negotiation of bills and notes for a limited sum.—*Section 1.* The Act passed in the seventeenth year of the reign of King George the Third, chapter thirty, and so much and such part and parts of any other Act or Acts as continue or revive the said Act, or as prohibit or restrain or impose any penalty for or on account of the publishing, uttering, or negotiating in England of any promissory or other note, not being a note payable to bearer on demand, bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of twenty shillings, or above that sum and less than five pounds, or on which twenty shillings or above that sum and less than five pounds, shall remain undischarged, made, drawn, or endorsed in any other manner than as directed by the said Act of the seventeenth year aforesaid and also the seventeenth section and schedules (C) and (D) of the Bank Notes (Scotland) Act, 1845, requiring or directing that all such notes, bills, drafts, or undertakings as aforesaid, which shall be issued in Scotland, shall be made, drawn, or endorsed according to the forms contained in the said schedules respectively, shall be and the same is and are hereby repealed.

(*Section 2 spent.*)

Note.—This Act was a temporary Act, but it was made permanent by the Expiring Laws Act, 1922 (12 & 13 Geo. 5, c. 50). The 17 Geo. 3, c. 30, and the 48 Geo. 3, c. 88, were repealed by the Bills of Exchange Act, 1882.

JUDGMENTS ACT, 1888.

(1 & 2 VICT. c. 110.)

How bills, notes, and cheques are to be taken in execution.—*Section 12.* That by virtue of any writ or fieri facias to be sued out of any superior or inferior court after the time appointed for the commencement of this Act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: Provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

Note.—See note to s. 88 of the Bills of Exchange Act and the *Annual Practice*.

STAMP ACT, 1858.

(16 & 17 VICT. c. 59.)

Payment by banker of draft or order held under forged indorsement.
—Section 19. Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof.

Note.—The remaining sections of this Act, which related to stamps, have long been repealed. The provisions of this section, in so far as they relate to bills payable on demand, are reproduced by s. 60 of the Bills of Exchange Act, p. 205; but it was not included in the schedule of repeals, because it was thought it might apply to drafts or orders other than bills; and it has been held that it applies to drafts drawn by one branch bank on another.¹ For the decisions on it, see notes to s. 60, p. 206. It has no apparent connection with s. 18, the section which preceded it, and which related to spoiled stamps. The section, says Lord Lindley, "was inserted at the instance of Lord Overstone, when cheques to order on demand bearing penny stamps were first introduced. He saw that these would become common, and would expose bankers to serious risks from forged indorsements, and the section was inserted for their protection. The Act, except s. 19, has been repealed, and in 1872 it was made applicable to documents issued by the Paymaster-General in pursuance of the Chancery Funds Act (35 & 36 Vict. c. 44, s. 11)".² See now s. 139 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49). It is perhaps doubtful how far the section applies to foreign drafts, e.g., a draft drawn by a branch office abroad on the head office in England.

COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 VICT. c. 125.)

Lost negotiable instruments.—*Section 87.* In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court, or a judge, or a master, against the claims of any other person upon such negotiable instrument.

Note.—In so far as this section relates to bills and notes, it is reproduced and extended by s. 70 of the Bills of Exchange Act, p. 229. It was not repealed because it applies to all negotiable instruments, and not merely to bills and notes.

¹ *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, 251, per Lord Lindley.

² *Ibid.*, per Lord Lindley at p. 251.

BANK HOLIDAYS ACT, 1871.

(34 & 35 VICT. C. 17.)

An Act to make provision for Bank Holidays, and respecting obligations to make payments and do other acts on such Bank Holidays.

Bills due on bank holidays to be payable on the following day.—
Section 1. The several days in the schedule to this Act mentioned (and which days are in this Act hereinafter referred to as bank holidays) shall be kept as close holidays in all banks in England and Ireland and Scotland respectively, and all bills of exchange and promissory notes which are due and payable on any such bank holiday shall be payable, and in case of non-payment may be noted and protested, on the next following day, and not on such bank holiday; and any such noting or protest shall be as valid as if made on the day on which the bill or note was made due and payable; and for all the purposes of this Act the day next following a bank holiday shall mean the next following day on which a bill of exchange may be lawfully noted or protested.

Provision as to notice of dishonour and presentation for honour.—
Section 2. When the day on which any notice of dishonour of an unpaid bill of exchange or promissory note should be given, or when the day on which a bill of exchange or promissory note should be presented or received for acceptance, or accepted or forwarded to any referee or referees, is a bank holiday, such notice of dishonour shall be given and such bill of exchange or promissory note shall be presented or forwarded on the day next following such bank holiday.

As to any payments on bank holidays.—*Section 3.* No person shall be compellable to make any payment or to do any act upon such bank holidays which he would not be compellable to do or make on Christmas Day or Good Friday; and the obligation to make such payment and do such act shall apply to the day following such bank holiday; and the making of such payment and doing such act on such following day shall be equivalent to payment of the money or performance of the act on the holiday.

Appointment of special bank holidays by royal proclamation.—
Section 4. It shall be lawful for her Majesty, from time to time, as to her Majesty may seem fit, by proclamation, in the manner in which solemn fasts or days of public thanksgiving may be appointed, to appoint a special day to be observed as a bank holiday, either throughout the United Kingdom or in any part thereof, or in any county, city, borough, or district therein, and any day so appointed

shall be kept as a close holiday in all banks within the locality mentioned in such proclamation, and shall, as regards bills of exchange and promissory notes payable in such locality, be deemed to be a bank holiday for all the purposes of this Act.

Note—See the proclamation of March 24, 1902, appointing June 26 and 27 as general bank holidays for the purpose of the Royal Coronation, and for a proclamation appointing a localised bank holiday, see the proclamation of October 20, 1902, appointing October 25 as a bank holiday throughout the county of London for the purpose of the Royal progress to the City. And see the proclamation of March 22, 1911, "appointing Thursday, June 22nd, and Friday, June 23rd, bank holidays and public holidays throughout the United Kingdom and in the County of London respectively", to celebrate the King's coronation and progress through London

Day appointed for bank holiday may be altered by Order in Council.—*Section 5.* It shall be lawful for her Majesty in like manner, from time to time, when it is made to appear to her Majesty in Council in any special case that in any year it is inexpedient that a day by this Act appointed for a bank holiday should be a bank holiday, to declare that such day shall not in such year be a bank holiday, and to appoint such other day as to her Majesty in Council may seem fit to be a bank holiday instead of such day, and thereupon the day so appointed shall in such year be substituted for the day so appointed by this Act.

Exercise of powers conferred by ss. 4 and 5 in Ireland by Lord Lieutenant.—*Section 6.* [*Superseded and repealed by s. 3 of the Holidays Extension Act, 1875 (38 & 39 Vict. c. 18).*]

Short title.—*Section 7.* This Act may be cited for all purposes as "The Bank Holidays Act, 1871".

SCHEDULE.

Bank Holidays in England [and Ireland].^a

Easter Monday.

The Monday in Whitsun week.

The first Monday in August.

The twenty-sixth day of December, if a week day.

Bank Holidays in Scotland.

New Year's Day.

Christmas Day.

If either of the above days falls on a Sunday the next following Monday shall be a bank holiday.

^a The Irish Free State, and, perhaps, Northern Ireland, can now make their own arrangements as to bank holidays. But, as before pointed out, negotiable instruments are a reserved subject as regards Northern Ireland: see p. 1.

Good Friday.

The first Monday of May.

The first Monday of August.

Note.—For the history of this legislation, see an article in the *Journal of the Institute of Bankers*, vol 22, p. 205 (May, 1901). This Act is amended and extended by the *Holidays Extension Act, 1875* (38 & 39 Vict. c. 13, set out below), and by the *Bank Holidays (Ireland) Act, 1903* (3 Edw. 7, c. 1), which provides for making St Patrick's Day a bank holiday in Ireland (see p. 344). As regards bills and notes it must be read with and subject to s. 14 of the *Bills of Exchange Act, p. 35*.

HOLIDAYS EXTENSION ACT, 1875.

(38 & 39 Vict. c. 13.)

Days mentioned in schedule to be holidays.—*Section 1.* The several days and each and every of them in the schedule to this Act mentioned, being holidays under the *Holidays Act of 1871*, shall be kept as public holidays in the customs, inland revenue offices, and bonding warehouses in England and Ireland respectively; and it shall be lawful for the directors or governing body (by whatever name known) of any dock or docks in England and Ireland respectively to cause the said days or any of them to be kept as holidays in such dock or docks, any restraining clause in any Act of Parliament notwithstanding: Provided that such directors or governing body shall give notice thereof by inserting an advertisement to that effect in some newspaper circulating in the locality of such dock or docks, and by affixing to the principal gates of the said dock or docks, or to some conspicuous place in the immediate neighbourhood, a notice to the same effect for at least a week immediately preceding any day which it is intended to observe as a holiday under this Act; and the anniversary of the coronation of her Majesty and her successors, and the birthday of the Prince of Wales, shall no longer be kept as holidays in any inland revenue office in England or Ireland.

December 26 falling on Sunday.—*Section 2.* Whenever the 26th day of December shall fall on a Sunday, the Monday immediately next following, that is to say, the 27th day of December, shall be a holiday under this Act, and also under the *Holidays Act of 1871*.

Exercise of powers by Lord Lieutenant of Ireland.—*Section 3.* The powers conferred on her Majesty by ss. 4 and 5 of the *Holidays Act of 1871* may be exercised in Ireland, as far as relates to that part of the United Kingdom, by the Lord Lieutenant in Council, and s. 6 of that Act is hereby repealed; and those powers of her Majesty and of

the Lord Lieutenant in Council shall extend to holidays under this Act.

Short title.—*Section 4.* This Act may be cited for all purposes as “The Holidays Extension Act, 1875”.

SCHEDULE.

Easter Monday.

Monday in Whitsun week.

The first Monday in August.

The 26th of December (if a week day).

St. Patrick's Day in Ireland. *Note.*—The provisions of this Act and of the Act of 1871 are further extended by the Bank Holiday (Ireland) Act, 1908 (8 Edw. 7, c. 1), which makes St. Patrick's Day a bank holiday in Ireland, and provides as follows:—

Section 1.—The provisions of the Bank Holidays Act, 1871, and the Holidays Extension Act, 1875, so far as they relate to Ireland, are extended to the seventeenth day of every March when a week day, and, if a Sunday, to the next day following, and this day shall be a bank holiday in Ireland within the meaning of these Acts.

As to Ireland now, see p. 1.

REVENUE ACT, 1883.

(46 & 47 VICT. c. 55.)

Extension of 45 & 46 Vict. c. 61, ss. 76 to 82, and 24 & 25 Vict. c. 98, s. 25, to certain drafts on bankers.—*Section 17.* Sections seventy-six to eighty-two, both inclusive, of the Bills of Exchange Act, 1882, [and s. twenty-five of the Forgery Act, 1861] shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque.

Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument.

For the purpose of this section, her Majesty's Paymaster-General, and the Queen's and Lord Treasurer's Remembrancer in Scotland shall be deemed to be bankers, and the public officers drawing on them shall be deemed customers.

Note.—See p. 304 as to crossed cheques, and *Capital and Counties Bank v. Gordon*, [1908] A. C. 240, at pp. 250, 251, H. L.

S. 25 of the Forgery Act, 1861, is now reproduced in s. 1 (3) of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27).

COUNTY COURTS ACT, 1884.

(24 & 25 GEO. 5, c. 58.)

What goods may be seized.—*Section 121.* Every bailiff or officer executing any warrant of execution issued from a County Court against the goods and chattels of any person may by virtue thereof seize,—

- (a) any of the goods and chattels of that person except the wearing apparel and bedding of that person or his family, and the tools and implements of his trade, to the value of five pounds, which shall to that extent be protected from such seizure; and
- (b) any money, bank notes, bills of exchange, promissory notes, bonds, specialties or securities for money, belonging to that person.

Replacing 51 & 52 Vict. c. 48, s. 147.

Disposal of bills of exchange, etc., seized.—*Section 123.* The registrar shall hold any bills of exchange, promissory notes, bonds, specialties, or other securities for money seized under process of a County Court, as security for the amount directed to be levied by such execution, or so much thereof as has not been otherwise levied or raised, for the benefit of the plaintiff, and the plaintiff may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby when the time of payment thereof arrives.

Replacing County Courts Act, 1888 (51 & 52 Vict. c. 48), s. 148.

Note—See The County Court Practice.

STAMP ACT, 1891.

(54 & 55 VICT. c. 39.)

All duties to be paid according to regulations of Act.—*Section 2.* All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

Notes.—A stamp objection may be pleaded; see, e.g., *Oettinger v. Cohn*, [1908] 1 K. B. 582. But it is not usual to do so, because when the instrument is tendered in evidence the officer of the Court raises the objection. As to stamp laws generally, see *Alpe's Law of Stamp Duties* (20th ed.) (1980).

Ireland.—As to Northern Ireland, see s. 29 of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 87), providing against double stamp duties, and the consequential

Order in Council of January 31, 1922, adapting the Act of 1921, printed Stat Rules and Orders, 1922, p 708.

As to the Irish Free State, see the Order in Council of March 29, 1923, set out p 357.

Facts and circumstances affecting duty to be set forth in instruments.—*Section 5.* All the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument; and every person who with intent to defraud her Majesty—

(a) Executes any instrument in which all the said facts and circumstances are not fully and truly set forth; or

(b) Being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances,

shall incur a fine of £10.

Note.—A post dated cheque is valid,⁴ but it is conceived that the person who issues it might possibly incur a penalty under this section.

Mode of calculating ad valorem duty in certain cases.—*Section 6.*—

(1) Where an instrument is chargeable with *ad valorem* duty in respect of (a) any money in any foreign or colonial currency, or (b) any stock or marketable security, the duty shall be calculated on the value, on the day of the date of the instrument, of the money in British currency according to the current rate of exchange, or of the stock or security according to the average price thereof.

Note.—This section is amended by s 12 of the Finance Act, 1899 (62 & 63 Vict c. 9), as regards instruments "other than a bill of exchange or promissory note". It therefore stands as regards bills and notes.

(2) Where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with that statement, it is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Note.—The sum receivable by the holder at maturity is calculated according to a different rule. See Bills of Exchange Act, s 72 (4), p 289.

General directions as to the cancellation of adhesive stamp.—*Section 8.*—(1) An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped⁵ with an adhesive stamp unless the person required by law

⁴ *Gatty v. Fry* (1877), 2 Ex D. 265, *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q. B. 715, C. A.

⁵ Cf *Mara v. Raay* (1874), 31 L. T. 372

to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectually cancels the stamp, and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

(2) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.

(8) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, shall incur a fine of £10.

Note—The provisos to s. 85 must be read in with this section. It has been ruled that cancellation made with a stamp or die is sufficient, and it seems that the cancellation may be made at any time before verdict, provided it can be made by the proper person.⁶

Bank Notes, Bills of Exchange, and Promissory Notes.

Meaning of "banker" and "bank note".—*Section 29.* For the purpose of this Act the expression "banker" means any person carrying on the business of banking in the United Kingdom, and the expression "bank note" includes—

- (a) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding one hundred pounds to the bearer on demand; and
- (b) Any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding one hundred pounds on demand, whether the same be so expressed or not and in whatever form, and by whomsoever the bill or note is drawn or made.

Bank notes may be re-issued.—*Section 80.* A bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorised to issue unstamped bank notes, may be from time to time re-issued without being liable to any stamp duty by reason of the re-issuing.

Penalties for issuing or receiving an unstamped bank note.—*Section 81.*—(1) If any banker, not being duly licensed or otherwise authorised to issue unstamped bank notes, issues, or permits to be

⁶ *Viale v. Michael* (1874), 30 L. T. 458.

issued, any bank note not being duly stamped, he shall incur a fine of £50

(2) If any person receives or takes in payment or as a security any bank note issued unstamped contrary to law, knowing the same to have been so issued, he shall incur a fine of £20.

Meaning of "bill of exchange".—*Section 82.* For the purposes of this Act the expression "bill of exchange" includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression "bill of exchange payable on demand" includes—

Bill on demand.

- (a) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and
- (b) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf.

Note.—A reference to s. 8 of the Bills of Exchange Act, p. 9, shows that many documents require to be stamped as bills of exchange which have none of the other incidents of bills, and which are clearly not negotiable instruments.⁷ A transfer order by a bank on the Bank of England in favour of the Customs is a bill payable on demand.⁸ Compare the definition of "bill payable on demand" given by s. 10 of the Bills of Exchange Act, p. 80, and note that for stamp purposes bills of exchange payable not more than three days after sight or date are put on the footing of demand bills: see s. 10 of the Finance Act, 1899, p. 357.

Stamp duties were first imposed on bills and notes by an Act of 1781, the 22 Geo. 3, c. 88. It applied only to inland instruments. Bills and notes drawn abroad were not subjected to stamp duty till 1854. The Stamp Act of that year, the 17 & 18 Vict. c. 83, which introduced adhesive stamps, first imposed the duty on the latter class of instruments.

⁷ See this section discussed in *Buck v. Robson* (1878), 3 Q. B. D. 686, where *Ex p. Sheppard* (1878), L. R. 17 Eq. 109, was disapproved; and *Fisher v. Calvert* (1879), 27 W. R. 301; see, too, *Midland Bank v. Inland Revenue Commissioners*, [1927] 2 K. B. 465 (receipts for sums under £2 used by customers for drawing on their accounts held to be within this section).

⁸ *The Committee of London Clearing House Bankers v. Inland Revenue*, [1896] 1 Q. B. 222 and 642 in C. A.

As to composition for Scottish bank notes, see 16 & 17 Vict. c. 63, s. 7. (In part repealed by Statute Law Revision Act, 1892. Repealed for Northern Ireland by 18 & 19 Geo. 5, c. 29 (N. I).)

Meaning of "promissory note".—Section 88.—(1) For the purposes of this Act the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money.^{2a}

(2) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

Note.—As to "bank note", see section 29. A reference to s. 88 of the Bills of Exchange Act, p. 267, shows that many instruments require to be stamped as promissory notes which have none of the other incidents of promissory notes.

See this section examined in *British India Steam Navigation Co. v. Inland Revenue* (1881), 7 Q. B. D. 165, where an instrument purporting to be a debenture, though coming within the terms of this section, was held to be properly stamped as a debenture, and not to require a note stamp. As to instruments intended to operate as agreements and not as notes, see *Mortgage Insurance Corporation v. Inland Revenue* (1888), 21 Q. B. D. 352, C. A., where it was held that a document promising to pay money, but containing other stipulations, did not require a promissory note stamp. In *Brown, Shipley & Co. v. Inland Revenue*, [1895] 2 Q. B. 598, C. A., it was held that promissory notes issued by an American railway, which contained a pledge of collateral security, required to be stamped as "marketable securities" and not as promissory notes. In *Speyer Bros. v. Inland Revenue*, [1908] A. C. 92, H. L., it was held that gold coupon notes of the Mexican Government came within the definition both of promissory note and marketable security, and that the crown was therefore entitled to demand the higher duty, *viz.*, the duty on marketable securities. But by s. 8 of the Finance Act, 1897 (60 & 61 Vict. c. 24), county council and municipal bills, though charged on the local rate, are to be stamped as promissory notes and not as marketable securities.

Provisions for use of adhesive stamps on bills and notes.—Section 84.—(1) The fixed duty of [twopence] on a bill of exchange payable on demand or at sight or on presentation may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

(2) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

Note.—By s. 86 of the Finance Act, 1918, p. 868, "twopence" is substituted for one penny in this section. The proviso to s. 88, enabling the person to whom a bill on demand is presented for payment to stamp it, must be read in with the present section. In *Hobbs v. Guthrie* (1890), 6 T. L. R. 292, it was held that a cheque which was stamped by an intermediate holder, not the drawer, was improperly stamped. Under s. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), as amended by s. 10 of the Revenue Act, 1909 (9 Edw. 7, c. 43), p. 357, bills payable not more than three days after date or sight may be stamped with a penny stamp. This sum is now raised to twopence.

Provisions as to stamping foreign bills and notes.—Section 35.—(1) Every person into whose hands any bill of exchange or promissory

^{2a} *Wuth v. Weigel and Others* (1899), 3 A. E. R. 712.

note drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped, shall, before he presents for payment, or indorses, transfers, or in any manner negotiates^a or pays the bill or note, affix thereto a proper adhesive stamp, or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

(2) Provided as follows—

- (a) If at the time when any such bill or note comes into the hands of any *bona fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person;
- (b) If at the time when any such bill or note comes into the hands of any *bona fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed.

(8) But neither of the foregoing provisos is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp.

Other bills and notes, how stamped. *Note.*—The effect of the Act of 1891, as amended by the Acts of 1899, 1909 and 1918, pp. 867, 868, appears to be this: 1. Bills of exchange payable on demand, or not more than three days after date or sight, may be stamped with an adhesive or impressed twopenny stamp. Cf. *Re Boyse* (1886), 88 Ch. D. 612. 2. Other bills, if drawn in the United Kingdom, must be stamped with an impressed *ad valorem* stamp, and if drawn abroad, with adhesive *ad valorem* stamps. 3. Promissory notes, if made abroad, must be stamped with adhesive *ad valorem* stamps, and if made in the United Kingdom, with an impressed *ad valorem* stamp. Cf. *Oettinger v. Cohn*, [1908] 1 K. B. 582.

Foreign stamp laws.—By s. 72 (1) of the Bills of Exchange Act, p. 284, it is provided that where a bill or note is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue, and this seems right, as the present Stamp Act requires bills issued abroad to be stamped here, and makes no allowance for the foreign stamp.

As to bills and notes purporting to be drawn abroad.—*Section 86.* A bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purpose of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom.

Note.—Compare s. 4 of the Bills of Exchange Act, p. 18, as to other purposes.

Terms upon which bills and notes may be stamped after execution.—*Section 87.*—(1) Where a bill of exchange or promissory note has been

^a Cf. *Griffin v. Weatherby* (1868), L. R. 3 Q. B. at p. 760.

written on material bearing an impressed stamp or sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable.

(2) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

Penalty for issuing, etc., any unstamped bill or note.—Section 38.—

(1) Every person who issues,¹⁰ indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped, shall incur a fine of ten pounds, and the person who takes or receives from any other person any such bill or note¹¹ either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

(2) Provided that if any bill of exchange payable on demand, or at sight, or on presentation, is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of [twopence], and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available.

(3) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill.

Effect where bill or note not properly stamped. *Note.*—By s. 36 of the Finance Act, 1918, p. 868, "twopence" is now substituted for "one penny" in this section. As to the proviso, see note to s. 34, p. 849.

In a Scots case, a note made abroad was presented for payment unstamped, but was stamped before action brought. It was held that the action was maintainable.¹²

An unstamped bill or note is admissible in criminal proceedings (see s. 14 of the Stamp Act), and as heretofore it would be admissible in evidence for the purpose of proving some purely collateral fact, such as fraud.¹³

The holder of a bill or note which is void for want of a stamp may, nevertheless, bring an action on the consideration against the party to whom he gave the consideration,¹⁴ though he cannot use the instrument as evidence.¹⁵ As the bill is void the omission to present or give notice of dishonour is immaterial.¹⁶

¹⁰ See s. 2 of the Bills of Exchange Act, p. 7, and notes, and cf. *Bank of Montreal v. Exhibit and Trading Co.* (1906), 17 Com. Cas. 250 (note signed in Liverpool and posted to payee in Canada).

¹¹ Cf. *Maro v. Rony* (1874), 31 L. T. 372; *Foster v. Driscoll*, [1929] 1 K. B. 470.

¹² *Broddehus v. Grischott* (1887), 24 Sc. L. R. 386.

¹³ *Gregory v. Fraser* (1813), 8 Camp. 459 (maker drunk); 170 E. R.; cf. *Sutton v. Toomer* (1827), 7 B. & C. 416; 108 E. R.; *Alpe's Law of Stamp Duties*, 20th ed., pp. 40—43; but see *Fengl v. Fengl*, [1914] P. 274.

¹⁴ *Brown v. Watts* (1808), 1 Taunt. 353; 127 E. R.; cf. *Sutton v. Toomer*, *supra*; *Plimley v. Westley* (1835), 2 Bing. N. C. 249; 132 E. R.; and *Gompertz v. Bartlett* (1853), 2 E. & B. 849; 118 E. R.

¹⁵ *Sweeting v. Halse* (1829), 9 B. & C. 365; 109 E. R.; *Jardine v. Payne* (1831), 1 B. & Ad. 683, at p. 670; 109 E. R.

¹⁶ *Cundy v. Marriott* (1881), 1 B. & Ad. 696; 109 E. R.

Possibly a person who indorses a bill, or transfers it by delivery, undertakes that it is not void under the stamp laws when transferred.¹⁷

An unstamped bill or note is admissible for the purpose of showing that it is not properly stamped, *e.g.*, to negative defence of payment by a bill,¹⁸ but it is not admissible to prove the receipt of money.¹⁹ A witness may also refresh his memory by referring to an unstamped note.²⁰

No appeal lies from the decision of a Judge wrongly admitting an unstamped document.²¹

One bill only of a set need be stamped.—*Section 89.* When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated²² apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

Amount of Duty as per Schedule.

Amount of duty.	£	s.	d.
Bill of exchange payable on demand or at sight, or on presentation, [or within three days after date or sight ²³]	0	0	[2]

And see ss. 32, 34 and 38. By s. 36 of the Finance Act, 1918, p. 368, the duty of one penny is increased to twopence.

Bill of exchange of any other kind whatsoever (except a bank note) and promissory note of any kind whatsoever (except a bank note) drawn or expressed to be payable, or actually paid or indorsed, or in any manner negotiated in the United Kingdom where the amount or value (<i>cf.</i> s. 6) of the money for which the bill or note is drawn or made does not exceed £5	0	0	[2]
Exceeds £5 and does not exceed £10	0	0	2
„ 10 „ 25	0	0	3
„ 25 „ 50	0	0	6
„ 50 „ 75	0	0	9
„ 75 „ 100	0	1	0
„ 100— for every £100, and also for any fractional part of £100, of such amount or value	0	1	0

¹⁷ See s. 55, p. 181; s. 58 (3), p. 191; and *Gompertz v. Bartlett* (1858), 23 L. J. Q. B. 65.

¹⁸ *Smart v. Nokes* (1844), 6 M. & Gr. 911; 134 E. R.

¹⁹ *Ashling v. Boon*, [1891] 1 Ch. 568. *Cf. Durie v. Fielding* (1898), 20 Rettis 295.

²⁰ *Birchall v. Bullough*, [1896] 1 Q. B. 325.

²¹ *Blignett v. Tritton*, [1892] 2 Q. B. 327, C. A.

²² *Cf. Griffin v. Weatherby* (1868), L. R. 3 Q. B. at p. 760.

²³ These words are added by s. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), p. 368.

Foreign bills. *Note*—This scale is varied as regards bills of exchange above £50 drawn and expressed to be payable out of the United Kingdom, by s. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), p. 357, which provides that where the amount of the bill exceeds £50 the stamp shall be 6d., and that where the amount exceeds £100 the stamp shall be 6d. for every hundred pounds and also for any fractional part of a hundred pounds of that amount. The Inland Revenue Commissioners, in their report for 1922, p. 57, tabulate the effect of this section as follows:—

[†] Bill of exchange (foreign), drawn and expressed to be payable out of the £ s. d. United Kingdom, and actually paid or indorsed, or in any manner negotiated, in the United Kingdom:

Where the amount does not exceed £10	0	0	2
Exceeds £10 and does not exceed £25	0	0	3
" £25	0	0	6
Exceeds £100, for every £100 and also for any fractional part of £100	0	0	6

[* N.B.—The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom must be denoted by adhesive stamps.]

Bill payable with interest.—The fact that a bill is payable with interest does not affect the stamp,²⁴ e.g., a note for £50 payable with interest at 5 per cent. requires only a 6d stamp.

By s. 36 of the Finance Act, 1918, p. 868, the one penny duty is increased to twopence.

Exemptions.

- (1) Bill or note issued by the Bank of England or Bank of Ireland.
- (2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.
- (3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom directing the payment of any sum of money, the sum not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf.
- (4) Letter of credit granted in the United Kingdom authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom.
- (5) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England, or by the Accountant-General of the Supreme Court of Judicature in Ireland.
- (6) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the government or parliamentary stocks or funds.
- (7) Bill drawn by any person under the authority of the Admiralty upon and payable by the Accountant-General of the Navy.
- (8) Bill drawn (according to a form prescribed by her Majesty's orders by any person duly authorised to draw the same) upon

²⁴ *Prussing v. Ing* (1821), 4 B. & Ald. 204; 106 E. R.; *Wills v. Nott* (1884), 4 Tyr. 726.

and payable out of any public account for any pay or allowance of the army or auxiliary forces, or for any other expenditure connected therewith.

- (9) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.
- (10) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue.²⁵
- (11) [Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for payment of a security.²⁶]

Note.—And see ss. 32, 33, 34, 35, 36, 37, 38 and 39. There are also various special exemptions collected in *Alpe's Law of Stamp Duties*, 20th ed., p. 322; see, *e.g.*, s. 38 of the Friendly Societies Act, 1896, and s. 38 of the Post Office Act, 1908 (8 Edw. 7, c. 48).

Notarial Acts.

Duty may be denoted by adhesive stamp.—*Section 90.* The duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp which is to be cancelled by the notary.

Note.—Where the duty on a bill or note does not exceed 1s., the duty on the protest is the same as on the bill or note. In any other case the duty is 1s., and the duty on any notarial act other than a protest is 1s. See Sched. to Stamp Act, 1891.

Receipts.

Provisions as to duty upon receipts.—*Section 101.*—(1) For the purposes of this Act the expression “receipt” includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any

²⁵ This exemption applies only to bills drawn for the sole purpose of remitting and placing to its proper account money which is already public money: *The Committee of London Clearing Bankers v. The Commissioners of Inland Revenue*, [1896] 1 Q. B. 222, 542, C. A.

²⁶ By s. 40 of the Finance Act, 1894 (57 & 58 Vict. c. 80), a coupon for interest on a marketable security as defined by the Stamp Act, 1891, being one of a set of coupons, whether issued with the security or subsequently issued in a sheet, shall not be chargeable with any stamp duty. See, too, *Rothschild v Inland Revenue*, [1894] 2 Q. B. 142.

such acknowledgment, and whether the same is or is not signed with the name of any person.

(2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Terms upon which receipts may be stamped after execution.—*Section 102.* A receipt given without being stamped may be stamped with an impressed stamp upon the terms following, that is to say,—

- (1) Within fourteen days after it has been given, on payment of the duty and penalty of five pounds;
- (2) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds; and shall not in any other case be stamped with an impressed stamp.

Penalty for offences in reference to receipts.—*Section 103.* If any person—

- (1) Gives a receipt liable to duty and not duly stamped; or
- (2) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or
- (3) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty; he shall incur a fine of ten pounds.

SCHEDULE.

RECEIPT given for, or upon the payment of, money amounting to two pounds or upwards, [twopence].²⁷

Exemptions

- (1) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.
- (2) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.
- (3) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of her Majesty.
- (4) Receipt given by an officer of a public department of the State for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom.

²⁷ 2d. substituted for 1d. by s. 84 of the Finance Act, 1920 (10 & 11 Geo. 5, c. 18).

- (5) Receipt given by any agent for money imprest to him on account of the pay of the army.
- (6) [Receipt given for or on account of any salary, pay or wages, or for or on account of any other like payment made to or for the account or benefit of any person, in respect of his office or employment being the holder of an office or an employee, in respect of his office or employment, or for or on account of any money paid in respect of any pension, superannuation allowance, compassionate allowance or other like allowance.²⁸]
- (7) Receipt given for any principal money or interest due on an exchequer bill.
- (8) *Receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.*²⁹
- (9) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.
- (10) Receipt given for the consideration money for the purchase of any share in any of the Government or Parliamentary stocks or funds, or in the stocks and funds of the Secretary of State in Council of India, or of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively.
- (11) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.
- (12) Receipt given for any allowance by way of drawback or otherwise upon the exportation of any goods or merchandise from the United Kingdom.
- (13) Receipt given for the return of any duty of customs upon a certificate of over entry.
- [(14) Receipt given by an officer of a county court for money received by him from a party to any proceeding in the Court.
- (15) Receipt given by or on behalf of a clerk to justices or a magistrate for money received in respect of a fine.]

Notes.—And see ss. 101, 102 and 108. Exemption No. 6 is substituted for the former exemption by s. 86 of the Finance Act, 1924 (14 & 15 Geo. 5, c. 21).

Indorsement receipt.—By s. 9 of the Finance Act, 1895 (58 & 59 Vict. c. 16), "Exemption numbered eight under the head 'Receipt' in the First Schedule to the Stamp Act, 1891, is hereby repealed; and the duty shall be charged as if the exemption had not been contained in that schedule; provided that neither the name of a banker (whether accompanied by words of receipt or not) written in the ordinary course of his business as a banker upon a bill of exchange or promissory

²⁸ 14 & 15 Geo. 5, c. 21, s. 86.

²⁹ Repealed by 58 Vict. c. 16, s. 9.

note duly stamped, nor the name of the payee written upon a draft or order, it payable to order, shall constitute a receipt chargeable with stamp duty".

Exemptions Nos. 14 and 15 were added by the Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 8.

ORDER IN COUNCIL, MARCH 29, 1923.

The Relief in respect of double Taxation [Irish Free State] Declaration, 1923.

PART III.

Stamp Duties.

(a) Where on or after the first day of April, nineteen hundred and twenty-three an instrument is chargeable with Stamp Duty in Great Britain and in the Irish Free State, and has been stamped in one of those countries, the instrument shall, to the extent of the duty it bears, be deemed to be stamped in the other country.

Provided that, if the Stamp Duty chargeable on any instrument in such other country exceeds the Stamp Duty chargeable in respect of that instrument in the country in which the instrument has previously been stamped, the instrument shall not be deemed to have been duly stamped in such other country unless and until stamped in accordance with the laws of that country with a stamp denoting an amount equal to such excess.

(b) Where composition for Stamp Duty is made or agreed to be made in one of such countries, any instrument which by virtue of the composition is exempt from the payment of duty in that country shall, on and after the said first day of April, be treated in the other country as having been stamped in the first-mentioned country with a stamp denoting the amount of duty which, but for the composition, would have been chargeable on that instrument.

(c) This arrangement shall apply as between Northern Ireland and the Irish Free State in like manner as it applies as between Great Britain and the Irish Free State until the Government of Northern Ireland signify that they have withdrawn their consent to such application.³⁰

FINANCE ACT, 1899.

(62 & 63 Vict. c. 9.)

Reduction of duty on certain bills of exchange.—Section 10.—(1) The duty payable under the Stamp Act, 1891, on bills of exchange drawn and expressed to be payable out of the United Kingdom, when

³⁰ Printed Stat. Rules and Orders, 1923, p. 410.

actually paid or indorsed or in any manner negotiated in the United Kingdom, shall, where the amount of the money for which the bill is drawn exceeds fifty pounds, be reduced so as to be—

- (a) where the amount exceeds fifty pounds and does not exceed one hundred pounds, sixpence; and
- (b) where the amount exceeds one hundred pounds, sixpence for every one hundred pounds and also for any fractional part of one hundred pounds of that amount.

(2) The stamp duty chargeable under the Stamp Act, 1891, on bills of exchange expressed to be payable at a period not exceeding three days after date or sight shall be one penny, in lieu of the duty now chargeable thereon; and accordingly the first heading, Bill of Exchange, in the Schedule to that Act, shall be read as if the words “or within three days after date or sight” were contained therein, after the word “presentation”.

Note.—This section is explained or supplemented by s. 10 of the Revenue Act, 1909 (9 Edw. 7, c. 48), which runs as follows:—

10. The provisions in sections thirty-four and thirty-eight of the Stamp Act, 1891, which relate to bills of exchange payable on demand or at sight, or on presentation, shall apply also to bills of exchange expressed to be payable at a period not exceeding three days after date or sight which are chargeable with the duty of [one penny] under sub-s. 2 of s. 10 of the Finance Act, 1899.

See now s. 36 of the Finance Act, 1918, p. 368.

BILLS OF EXCHANGE (CROSSED CHEQUES) ACT, 1906.

(6 Edw. 7, c. 17.)

An Act to amend section eighty-two of the Bills of Exchange Act, 1882. [4th August, 1906.]

Amendment of 45 & 46 Vict. c. 61, s. 82.—*Section 1.* A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

Short title.—*Section 2.* This Act may be cited as the Bills of Exchange (Crossed Cheques) Act, 1906, and this Act and the Bills of Exchange Act, 1882, may be cited together as the Bills of Exchange Acts, 1882 and 1906.

Note.—This Act was passed to get rid of the decision in *Capital and Counties Bank v. Gordon*, [1903] A. C. 240, H. L., where it was held that if a bank received a crossed cheque from a customer, and at once credited his account with the amount, the bank became holders for value of the cheque; and in receiving payment thereof, received it on their own account, and not merely as agents for

collection on behalf of their customer. They therefore did not come within the protection given by s. 82 of the Bills of Exchange Act to collecting bankers. See p. 261.

The Bill, which became the Act of 1906, was drafted by the Author under instructions from Lord Halsbury in 1903, but it was blocked in the House of Commons till 1906.

BILLS OF EXCHANGE ACT (1882) AMENDMENT ACT, 1932.

(22 & 23 GEO. 5, c. 44.)

An Act to amend the Bills of Exchange Act, 1882. [12th July, 1932.]

Amendment as to cheques drawn by a bank on itself.—Section 1. Sections seventy-six to eighty-two of the Bills of Exchange Act, 1882 (which relate to crossed cheques), as amended by the Bills of Exchange (Crossed Cheques) Act, 1906, shall apply to a banker's draft as if the draft were a cheque.

For the purposes of this section the expression "banker's draft" means a draft payable on demand drawn by or on behalf of a bank upon itself, whether payable at the head office or some other office of the bank.

Short title.—Section 2. This Act may be cited as the Bills of Exchange Act (1882) Amendment Act, 1932.

Note.—See p. 266 as to crossed cheques.

COMPANIES ACT, 1929.

(19 & 20 GEO. 5, c. 28.)

Bills of exchange and promissory notes.—Section 80. A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company, by any person acting under its authority.

Note.—This section reproduces s. 77 of the Act of 1908, which reproduced, with a verbal alteration, s. 47 of the Companies Act, 1862 (25 & 26 Vict. c. 89). See some general remarks on the repealed section of the Act of 1862 in *Ex p. Overend* (1869), L. R. 4 Ch. App. at pp. 472, 473; *Re Barber* (1870), L. R. 9 Eq. 732, 735. Compare to like effect the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 38.

S. 80 does not confer on all limited companies the capacity to issue bills and notes. It refers only to such companies as have the requisite capacity; cf. *Re Peruvian Railways Co.* (1867), L. R. 2 Ch. 617. To render a company liable on a negotiable

instrument three conditions must be fulfilled: 1. The company must have the requisite capacity: see notes to s. 22 of the Act, p. 60. 2. The signature must be affixed by some person having express or implied authority to sign on behalf of the company: see *e.g.*, *Dey v. Pullinger*, [1921] 1 K. B. 77, dissenting from *Premier Industrial Bank v. Carlton Manufacturing Co.*, [1909] 1 K. B. 106; and see *Alexander Stewart & Son v. Westminster Bank, Ltd.*, [1926] W. N. 271, C. A. (ostensible authority negatived), reversing Court below; *Kreditbank Cassel v. Schenkers*, [1927] 1 K. B. 826 (ostensible authority of a provincial manager negatived). 3. The signature must be in such form as to be the signature of and bind the company: see, *e.g.*, *Chapman v. Smethurst*, [1909] 1 K. B. 927, C. A.; *Stacey v. Wallace* (1912), 106 L. T. 541, and notes to s. 22, p. 63, and s. 28.

Publication of name by limited company.—*Section 98.*—(1) Every company—

- (a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible;
- (b) shall have its name engraven in legible characters on its seal;
- (c) shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

(2) If a company does not paint or affix its name in manner directed by this Act, the company and every officer of the company who is in default shall be liable to a fine not exceeding five pounds, and if a company does not keep its name painted or affixed in manner so directed, the company and every officer of the company who is in default shall be liable to a default fine.

(3) If a company fails to comply with paragraph (b) or paragraph (c) of subsection (1) of this section, the company shall be liable to a fine not exceeding fifty pounds.

(4) If a director, manager, or officer of a company, or any person on its behalf—

- (a) uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid; or
- (b) issues or authorises the issue of any notice, advertisement, or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods wherein its name is not mentioned in manner aforesaid; or
- (c) issues or authorises the issue of any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid;

he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of the bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless it is duly paid by the company.

Note.—This section reproduces, with certain amendments, s. 63 of the Companies (Consolidation) Act of 1908, which reproduced, with verbal amendments, ss. 41 and 42 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which in its turn reproduced s. 81 of the 19 & 20 Vict. c. 47. Under the last-mentioned enactment a bill was addressed to the S. Steam Packet Co. The proper name was the S. Steam Packet Co., *Limited*. The secretary accepted the bill, signing it "J. M., Secretary to the said Company". He was held personally liable on this acceptance: *Penrose v. Martyr* (1868), E. B. & E. 499; cf. *Atkins v. Wardle* (1869), 58 L. J. Q. B. 377, where the words forming the company's name were transposed, and *Nassau Steam Press v. Tyler* (1894), 70 L. T. 376, where words were added in the company's name. But where, by an accident in stamping the company's name to an acceptance, the word "limited" did not appear as it passed the margin of the paper, the acceptance was held to be the acceptance of the company: *The Dermatine Co. v. Ashworth* (1905), 21 T. L. R. 510. The address to the drawee and the acceptance must be construed together: *Stacey & Co. v. Wallace* (1912), 106 L. T. 541.

BANKRUPTCY ACT, 1914.

(4 & 5 GEO. 5, c. 59.)

SCHEDULE I, R. 11.

Voting by bill holder.—11. A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

Note.—This rule, which reproduces Rule 11 of the Act of 1883, substantially follows a clause in Sir J. Holker's Bill of 1880. Before the Act of 1883 a bill-holder was held to be merely a guaranteed and not a secured creditor. He was treated as holding the guarantee of third persons, and not a security on the property of the debtor. As a general rule he might vote as an unsecured creditor, and prove for the full amount of the bill against all parties liable on it until he received in the whole twenty shillings in the pound. If, however, before proof, he had received or been declared entitled to a dividend from one or other of the estates, he could only prove for the balance. See, e.g., *Ex p. Newton* (1880), 16 Ch. D. 880, O. A.; *Ex p. Schofield* (1879), 12 Ch. D. 387, C. A. (bills indorsed and advances made pending discount). The present rule deals only with his right to vote, not with his right to dividends. As to when a bill must be valued as a security for all purposes, see *Ex p. Schofield*, *supra*, at p. 347, *per James, L.J.* It seems this is only necessary when bills are deposited unindorsed, or indorsed under such circumstances that the indorser is not liable to the depositee on the indorsement. See, further, *Williams' Bankruptcy* (18th ed.).

SCHEDULE II, R. 19.

Proof in respect of Distinct Contracts.

Two or more firms, etc.—19. If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts.

Note—This rule, which reproduces Rule 18 of the Act of 1888, is taken from s. 87 of the Act of 1869, which generalised s. 152 of the Act of 1861, which only applied to bills and notes. See the history and policy of the enactment discussed by Lord Blackburn in *Banco de Portugal v Waddell* (1880), 5 App. Cas. at p. 171.

Foreign bankruptcy and double proof.—The object of the enactment is to override the rule forbidding double proof where there are two firms with a common partner. It does not apply to the case of the same firm carrying on business in two places under different names (*ibid*). If in such case the foreign estate of the firm is administered abroad, the ordinary rule applies, namely, that "a person who, after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtors in England, may do so; but he must do so upon the terms of bringing in for the purpose of dividend the sum which he has received abroad" (*per* Lord Cairns, at p. 167). See, further, as to this rule, *Ex p Honey* (1871), L. R. 7 Ch. 178; *Ex p Stone* (1873), L. R. 8 Ch. 914.

Production of bill for proof.—By Rule 252 of the Bankruptcy Rules, 1915, it is provided that, "Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the debtor is liable, such bill of exchange, note, instrument, or security must, subject to any special order of the Court made to the contrary, be produced to the Official Receiver, chairman of a meeting, or trustee, as the case may be, before the proof can be admitted either for voting or for dividend".

Note.—See *Williams' Bankruptcy* (18th ed.)

Production for dividend.—By Rule 269 of the Bankruptcy Rules, 1915, it is provided that, "Subject to the provisions of section 70 of the Bills of Exchange Act, 1882, and subject to the power of the Court in any other case on special grounds to order production to be dispensed with, every bill of exchange, promissory note, or other negotiable instrument or security, upon which proof has been made,

shall be exhibited to the trustee before payment of dividend thereon, and the amount of dividend paid shall be indorsed on the instrument ”.

BILLS OF EXCHANGE (TIME OF NOTING) ACT, 1917.

(7 & 8 GEO. 5, c. 48.)

An Act to amend the Bills of Exchange Act, 1882, with respect to the time for noting bills. [8th November, 1917.]

Time of noting.—*Section 1.* In subsection (4) of section fifty-one of the Bills of Exchange Act, 1882 (which relates to the time of noting a dishonoured bill), the words “it must be noted on the day of its dishonour” shall be repealed, and the following words shall be substituted therefor, namely, “it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day”.

Short title and construction.—*Section 2.* This Act may be cited as the Bills of Exchange (Time of Noting) Act, 1917, and shall be construed as one with the Bills of Exchange Act, 1882, and the Bills of Exchange Acts, 1882 and 1906, and this Act may be cited together as the Bills of Exchange Acts, 1882 to 1917.

FINANCE ACT, 1918.

(8 & 9 GEO. 5, c. 15.)

PART IV.

STAMPS.

Increase of stamp duty on certain bills of exchange.—*Section 86.*—

(1) Twopence shall be substituted for one penny as the stamp duty on all bills of exchange and promissory notes chargeable under the First Schedule to the Stamp Act, 1891, with duty at the rate of one penny and drawn on or after the first day of September, nineteen hundred and eighteen, and twopence shall accordingly be substituted for one penny in sections thirty-four and thirty-eight of the Stamp Act, 1891.

(2) The provisions of subsection (2) of section thirty-eight of the Stamp Act, 1891, shall apply so as to enable an adhesive penny stamp to be fixed on any bills of exchange to which that subsection applies being bills which are liable to a duty of twopence under this section and are stamped only with a penny stamp, as they apply with respect to the fixing of a stamp on an unstamped bill.

Note—Sub-s 3 was repealed by the Statute Law Revision Act, 1927.

SUPREME COURT OF JUDICATURE (CONSOLIDATION)
ACT, 1925.

(15 & 16 Geo. 5, c. 49.)

Execution or indorsement of instruments by order of court.—
Section 47. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, or to indorse any negotiable instrument, the High Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that the negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it.

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